AMERICAN GOVERNMENT AND CITIZENSHIP

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AMERICAN GOVERNMENT AND CITIZENSHIP

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AMERICAN GOVERNMENT AND CITIZENSHIP

AMERICAN POLITICAL THEORY
GOVERNMENT AND POLITICS
INTERNATIONAL RELATIONS

BY

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MANUFACTURED IN THE UNITED STATES OF AMERICA

To

WILLIAM BENNETT MUNRO

whose scholarly research and effective presentation
have done much to reduce the study of
government to a science and
its teaching to
an art

38628

PREFACE

An intelligent comprehension of the duties and privileges of active citizenship requires a knowledge of the organization and functions of government, and some idea of how government may be improved so as to render it adequate to the exigencies of the times. Citizens are both spectators and agents. As spectators, they watch the processes of government from the outside; as agents, they participate more or less actively in the carrying on of those processes. To be able to discharge their manifold duties they need, first of all, information on all matters pertaining to their government—its structure, its powers, and its functions. But they need more than information. Since they are helping to shape the policy of the government for the future, to improve its processes, if possible, and to enable it to accomplish its purposes, they need some interpretation of its inner meaning, some enlightenment concerning the *rationale* of it all—how it came to be what it is, and what it may reasonably be expected to become. In short, they need instruction in the history and theory of their government.

When we raise the question of *rationale*, we stand face to face with the problem of governmental development. The American government is the product of a long process of evolution. It is a growth; and the key to an illuminating interpretation of its forms and functions must be sought in its genetic character. It has its roots in the past. It is the heir of all the ages. It is a product both of experience and of reason. When the Founding Fathers reached the end of experience in regard to any particular proposition, they launched out on some untried venture of theory. Thus in order to analyze correctly the final results of their labors, it is necessary to disentangle these two threads: experience and reason. In short, if we wish to interpret the American government we must travel back over the road that the Fathers trod, and in so doing attempt to reconstruct their thought as nearly as possible as it was when they faced the difficult and serious problem of saving the country from destruction.

The problem of the Founding Fathers was essentially practical—the problem of constructing a constitution which should at once meet the exigencies of the government and insure the preservation of the

union. They set about their task in a serious and systematic manner. They utilized the results of their colonial experience, of the Revolution, and especially of that conspicuous and lamentable failure, the Confederation. They ransacked history for the experience of the ages. Nor did they stop with experience; they levied upon the great store of political theory which had been accumulating from the days of Plato and Aristotle. The fact cannot be too strongly emphasized that in certain respects the Constitution of the United States was an untried venture. For some of its parts there were no precedents. Much of it, true enough, rested on the solid foundation of experience; but parts of the superstructure rose to the rarefied atmosphere of pure theory. James Wilson, one of the most gifted men of the Federal Convention, speaking before the Pennsylvania Constitutional Convention, pointed out that the work of the framers was enhanced by reason of their having no precedents to guide them, because "a perfect confederation of independent states is a system hitherto unknown." James Madison referred to the new system as a "novelty without precedent, ancient or modern."

Thus the Constitution was, in some respects, an excursion into the unknown. The Fathers did rely on reason when experience failed them. Hence any interpretation of their work that is to rise above mere description will have to take into account their rational principles of government, that is to say, their political theory. Experience was the raw material with which they worked; but in shaping this material into beautiful and permanent form they were guided by certain great architectonic principles for which they were indebted to political theory. There were many compromises; indeed, the actual Constitution was, in a sense, heated in the forge of conflicting interests and hammered out on the anvil of mutual concessions. But ever and anon there was a recourse to first principles. The framers never got entirely away from the great fundamentals of political philosophy, such as equality, sovereignty, liberty, and democracy.

Precisely because theory was so closely interwoven with practice in the formation of our political institutions, it is necessary to combine the two in any adequate interpretation of our government as it exists today. For this reason the joint authors of this text have allotted approximately one-sixth of their space to a discussion of American political theory. They believe that no genetic account of the rise and development of the American system of government can be complete without reference to first principles, that is, to those underlying theories of state and government, of liberty and sovereignty, of equality and democracy, which have been the common possession of

intelligent Americans from the beginning. And it is because purely descriptive methods of studying American government ignore this body of theory that they are so inadequate to the needs of active citizenship.

In view of the definite trend away from so much factual study of political organization, Part I of this book, entitled "The Political Theory of the United States," is included as the most appropriate introduction to the subject. This tendency is strikingly illustrated by the renewed interest that has recently been taken in the Constitution of the United States, and by the sesquicentennial celebration of the adoption of the Declaration of Independence which was widely observed last year.

Part II is entitled "The Government and Politics of the United States." There are here set forth, in more condensed form than in the majority of current studies, the essential facts of American political organization. To the end of making the study more functional than descriptive, the fundamental laws, the executive, the legislature, the courts, and government business, are considered in their federal, state, and local settings. For example, emphasis is placed on the *idea* of the executive department as a positive force in the American government, and this idea is developed as running through the entire governmental structure. Such a method of treatment makes unnecessary the usual divisions into national, state, and local government. The functions of government are generally the same, no matter how large or small the unit of administration. Thus a modest attempt has been made to cut through the rather rigid divisions of government, and to emphasize functions and ideas. While this method of approach is not traditional, it seems likely, in view of present tendencies, that future writers on the American government will not be altogether uninfluenced by it.

Besides setting forth the main facts of political organization and function, the authors have given attention to the citizen and his part in government. After all, the government is of him, by him, and for him. His relation to the Constitution, and his rights and duties under it; his relation to his party; his civic behavior generally—must find a place in every comprehensive book on the American government. The purpose of the authors has been to relate the entire book, so far as possible, to the actual conditions and problems of civic life.

Another trend in the study of government is the increased interest in international relations. The man in the street today is interested in world affairs. Ten years ago questions and events of an international character did not challenge his attention. His interest was

confined to the concerns of his locality, his state, and the nation. America's participation in the World War caused its citizens to begin to think internationally. They now want to know the facts and principles of their country's international life. The control of our foreign relations was lodged by the Constitution in the President and in the Senate. While periodical accountings in domestic affairs are demanded by the people as their clear right, judgments on questions of foreign policy have, owing to their nature, been reserved. The people now want a more direct and democratic control of foreign affairs, and a diplomacy quite in keeping with the democratic character of our domestic institutions. But the mere establishment of a more democratic control may not result in promoting international good-will or in preventing wars. A democracy must guard against giving unjust causes for war, and must be willing to examine its own motives in international relations. The first business of a democracy, in determining and controlling foreign policy and procedure, is to study diplomacy, both as a science and as an art. The ordinary citizen does not have an adequate background to appreciate this new trend in our economic and political thinking. Furthermore, it has been the fashion in our colleges and universities to postpone instruction in international affairs until the student has reached the later stages of his academic career. The authors feel that its introduction at an earlier stage, along with other features of the American government, will benefit both the student who progresses no further in the study of government, and the student who continues his political studies in the more advanced courses. The purpose of Part III, entitled "Foreign Relations of the United States," is to encourage and direct intelligent international thinking. One chapter is devoted to the major foreign policies of the United States. Another deals with the diplomatic practice and procedure of the country, giving special attention to the citizen in his relation to foreign governments and international affairs.

The foregoing considerations have dictated the use of materials of three sorts, namely, American political theory, American government and politics, and American foreign relations. The inclusion of political theory and foreign relations, and the consequently reduced consideration of political organization, are not mere innovations. The authors seek only to reconstruct method and content along the lines of established political thinking. Their collaboration has grown out of several years' experience in teaching American government to large classes in a number of American universities. They have had in mind the persons who may study, teach, and read the book, and this

includes student, teacher, and general reader. Their aim throughout has been to contribute to political thinking and understanding in this country, and to encourage a more intelligent and more active citizenship.

Charles E. Martin
William H. George

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PART I

THE POLITICAL THEORY OF THE UNITED STATES

CHAPTER I

POLITICAL THEORY IN COLONIAL ORIGINS

I. Genesis of the American Colonies

In the year 1783 King George III treated with the United States of America as free, sovereign, and independent states, and relinquished for himself, as for his heirs and successors, all claims to territorial and governmental rights. That year marked the close of a long period of colonial development in which licensed trading companies with a status only in private law became sovereign, independent states with rights and duties in public law and an established place in international relations. During the same period numerous proprietary colonies were transformed into royal provinces, which in turn achieved their independence. From the angle of human interest, the record of those years is filled with the struggles of an adventurous people against stubborn forces of nature and frequently hostile native tribes, as well as rival powers; from the angle of institutional development, the record is that of the gradual transformation of corporate commercial companies, founded for trade and profit, and of proprietary colonies, together with royal provinces, into self-governing commonwealths existing for purposes of public control and general welfare. In the moving picture of colonial history the merchant and the merchant company, together with the proprietor and the proprietary colony, gradually recede into the background and vanish, while the colonist, the freeman, the citizen, and the state are projected sharply upon the screen. The economic motive of trade is replaced by the political motive of government; and what began as a private venture ended as a great public enterprise—the founding of a new nation.

American colonization was a resultant of the action of many forces. Different groups of colonists were actuated by different motives. In general, however, the desire for greater freedom, and for material advantage in the form of easier living conditions; the desire to extend the Kingdom of England in competition with other colon-

izing powers, and to extend the Kingdom of God by carrying the Gospel to benighted savages—all contributed to the great result of sending forth a stream of venturesome and hopeful people across the wide expanse of ocean. The sheer love of adventure doubtless did inspire certain types of emigrants; but it is questionable if such a motive alone, unmixed with love of liberty, hope of gain, missionary zeal, or national ambition, would have found embodiment in chartered companies. Something more substantial than mere fondness for travel and adventure must be postulated to account for the organized and sustained efforts that were put forth to conquer a wilderness and gain a foothold in a far-away land. The motives which will account for this effort may be reduced to three, and may be described as economic, religious, and political.

The first permanent English settlement on the shores of North America was made by a trading and colonizing company which came to have the official title of "The Treasurer and Company of Adventurers and Planters of the City of London for the First Colony in Virginia." Associations of merchants, rendered necessary by the expense of foreign trade and the need of protection, date from the Middle Ages. Their growth was stimulated by the desire for commercial monopoly. To the London Company, a joint-stock concern, was granted by royal charter the exclusive possession of a strip of territory extending four hundred miles along the coast and "from sea to sea, west and northwest." To it was granted also the right to search for gold, silver, and copper, to coin money, to transport colonists and all things needful for the settlement, and to levy a tax on trafficking. Certain exemptions from import and export duties were allowed for a term of years. Since the company was planting a colony it had need of powers of government; accordingly it was given, by the second charter, "full and absolute power and authority to correct, punish, pardon, govern and rule" all English subjects who might find themselves in those parts, provided the statutes and ordinances made under this grant were conformable, as nearly so as conveniently might be, "to the laws, statutes, government and policy of this our realm of England."

The importance of trading and colonizing companies in early American history cannot be overestimated. While not all of the American colonies originated in chartered companies, the beginning was made in that way; and the subsequent ramifications of the corporate form were far-reaching. The colony of Massachusetts Bay sprang from a grant for a land and trading company obtained from

the Council for New England—a grant later confirmed by royal charter with the addition of powers of government. Connecticut was settled by men and women from Massachusetts who brought with them a commission of government granted by the General Court. In 1662 they obtained a royal charter which erected the colony into "a body politic and corporate" with the title of "The Governor and Company of the English Colony of Connecticut in New England in America." A corporate form with powers of government was obtained by Rhode Island in 1663. These politico-economic corporations were granted large powers of self-government, and these powers tended to expand with the growth of the population and the increasing exigencies of the times until they practically attained independence. In public law the corporations were subordinate political jurisdictions with powers resembling those of boroughs, municipal corporations, and trading companies in England; in fact, they rapidly developed in the direction of becoming free commonwealths. By the transfer of the charter and government of the colony of Massachusetts Bay from England to America, full scope for the development of a chartered company was given for the first time. The charter of the company soon became the fundamental law of an incipient commonwealth. The idea of trade by an incorporated company disappeared before the idea of public control exercised through the making of law and the administration of justice—in a word, government. Thus through force of circumstances private trading and colonizing companies were slowly metamorphosed into public and political corporations, and the desire for gain was supplanted by the desire to govern.

But the economic motive alone does not account for American colonization. Back of the founding of settlements in America there was a certain spirit and drive that cannot be accounted for solely by the quest of material advantage. There was a mystical force behind it all which urged men and women to go forth as though on a crusade. This was the compelling power of religion. It was the same otherworldly inspiration which prompts to missionary enterprises today. The colonists sought to advance the outposts of the Kingdom of God on earth. They would try a "holy experiment" on the shores of the New World. They would plant religion among savage tribes, and teach "those as yet heathen barbarians and brutish people, together with our English, to learn the speech and language of Canaan." The governors and counsellors of the Virginia Company declared in 1610 that the main purpose of planting a colony in foreign parts was "to preach and baptize into Christian religion, and by propagation of

the Gospel to recover out of the arms of the Devil a number of poor and miserable souls wrapt up unto death in almost invincible ignorance."[1] The first charter alludes to the religious purpose of the adventure. While official pronouncements cannot always be relied upon to reveal the motives back of popular movements, it is safe to affirm that religion was one of the factors which must be reckoned with in explaining the origin of Virginia and other colonies. The Pilgrims declared in solemn covenant that they had undertaken a voyage to plant a colony in parts of Virginia for "the glory of God and advancement of the Christian faith and honor of our king and country." The Puritans of Massachusetts Bay came to establish a Bible commonwealth wherein they might find civil and religious liberty, and preserve free from contamination pure forms of worship.

The religious motive led to institutional developments which are of the greatest importance in political theory. The separatist churches of New England worked out an ecclesiastical polity which made of congregationalism a seed-bed of democracy. Furthermore, religion itself supplied a principle of fundamental law by which the authority of the state was limited. The Bible commonwealth of Massachusetts Bay rested upon the Scriptures. The law of God was fundamental and paramount in both civil and religious matters, and any legal statute which was repugnant to that higher law was *ipso facto* null and void. Thus the people of Massachusetts Bay early became accustomed to thinking in terms of limited government. The ministers of the Gospel, men of outstanding ability and learning, considered themselves a sort of constitutional check on civil government. Their sermons, preached before elections and on other public occasions, were not infrequently dissertations on the nature and functions of civil government, and on the relation of civil magistrates to the law of God. The church of Massachusetts Bay more than held its own with the state; in fact, it tended to overshadow the state.

From the standpoint of political institutions, the reason for American colonization which left perhaps the deepest impress upon subsequent history was what might be termed the national motive. There were not a few imperialists among those interested in the new venture. They saw in it an excellent opportunity to extend the bounds of the Kingdom of England, and at the same time to curb the vaunting ambitions of Philip III by establishing a foreign base which might serve as a strategic position in the event of a future war. The found-

[1] Alexander Brown, *The Genesis of the United States* (2 vols., 1897), vol. I, p. 339.

ing of "a New Britain in another world" would be a means of "annexing another kingdom to the crown." It might prove to be a "bulwark of defence, in a place of advantage, against a stranger enemy." Here, moreover, was an effective means of building up a great navy; for materials such as cordage, pitch, tar, and resin were at hand, and trade back and forth would develop a merchant marine. Furthermore, opposition to the Spanish colonial policy, as well as antipathy to Spanish civilization in general, stirred the minds of many Englishmen of the seventeenth century to enlarge the bounds of English civilization. National rivalry will go far toward explaining the origin of Virginia.

The national motive easily and naturally worked itself out in political institutions. A "New Britain" would in the nature of things be modeled on the lines of British tradition, which rested on the principle that local affairs, to be well managed, had to be locally managed. Accordingly it is not surprising that we find in the second and third Virginia charters ample powers of self-government. True, the colony in Virginia was not at first free to govern itself; it was governed by the London Company in England. But under a liberal policy of management, attributable in particular to Sir Edwin Sandys, the company granted such a large measure of political freedom to the colony that the burgesses through their representatives took no little part in the formulation and direction of public policies. In Massachusetts Bay, through the transfer of the charter, a self-governing company became a self-governing colony. It was the national or political motive which made this development inevitable. Moreover, early English colonization in America was in a sense a protest against the Spanish policy of exploitation; and to give expression to the spirit of the protest, as well as to attract English settlers, the colonies had to be given the benefits of English civilization—with everything which that meant in the way of civil liberty and self-government. The germ of political autonomy lay in the conception of a "New Britain."

Following this brief survey of the motives which prompted American colonization, we may now trace more in detail some of the leading political ideas which emerged from that daring venture. New conditions lend themselves to political experimentation. In unsettled lands unforeseen situations arise which lead to new and spontaneous adjustments. Sheer distance weakens the control of the mother-country and gives to old principles a new orientation. The aristocratic, royal control under which the colonies began their existence eventuated in

political control by the whole people. Representation, not provided for in the charters, evolved from the exigencies of time and place. The sovereignty of the crown was often so modified as to be almost unrecognizable. The image and likeness of the king lost its sharp and bold outlines on being transported from the Old to the New World.

II. Sources of Political Authority

In the earliest permanent English settlement in the New World, the chartered colony of Virginia, it is clear that political authority developed from the crown through the London Company. The charter of 1606 established what was equivalent to royal government through a council. King James I, in appointing the council for Virginia, charged its members to acquaint the Privy Council with matters of importance and to follow its directions. In subsequent charters the king delegated to a trading and colonizing corporation the right to carry on the ordinary processes of government, with the proviso that statutes and ordinances framed by the company should conform to the laws of England. It was a deconcentration of political power. A sort of holding company was formed to serve as a depository of commercial rights and governmental powers. This intermediate body operated as a liaison between the royal will and the actual government on the ground in Virginia. It was a private venture encouraged by royal sanction and aided by the delegation of public powers. Thus the principle of the devolution of political power, accompanied by enumeration, definition, and limitation of powers, early became part and parcel of the mental equipment of the colonists. It became natural for them to conceive of political authority as descending from a fountain-source by way of a written instrument, and to regard the scope of that authority as delimited by the terms of the instrument. From the very nature of chartered colonies, then, there evolved the principle of subordinate and delegated powers which has figured so prominently in American institutions.

But not all of the colonies were founded by chartered companies. Some important ones were founded by proprietors. The model of all proprietary colonies was the county palatine of Durham, located close to the border-line between Scotland and England. For one reason or another the Bishop of Durham received and exercised such extensive powers as to be virtually a petty sovereign. He was the supreme head of the civil government, the universal landlord, the fountain of justice, as well as a prelate with ecclesiastical juris-

diction. The king levied no taxes in Durham except through the bishop; but the power of the bishop was checked by a local assembly which wrung from him a charter of liberties, and an appeal lay from the local courts to the king. The royal supremacy was saved, but short of that the Bishop of Durham was veritably a miniature king.

The charter granted by Charles I to Lord Baltimore carried with it "ample rights, jurisdictions, privileges, prerogatives, royalties, liberties, immunities, and royal rights, and temporal franchises whatever" quite as extensive as those exercised by any Bishop of Durham. Lord Baltimore and his heirs were made "true and absolute lords and proprietaries" of Maryland, reserving only allegiance and sovereign dominion to the king. As a token of their vassalage they were bound to deliver at Windsor Castle every year two Indian arrow-heads; and their rent was to be one-fifth of all the gold and silver found. To the lord proprietor was granted "free, full and absolute power" to enact laws with the advice and assent of the freemen or their delegates. He and his heirs were the fountain of justice, with the right to erect courts and appoint judges, writs running in the name of the proprietor and not of the king. The patronage and advowson of churches was his, and, of course, the right to parcel out and dispose of lands. In emergencies the proprietor might issue ordinances for keeping the peace and maintaining good government, provided such ordinances did not touch fundamental rights of life, liberty, and property. Thus Maryland was indeed a feudal principality. A landed proprietor was head of the civil government and patron of churches. Taxation was his prerogative, with the assent of the assembly. Laws enacted in Maryland and signed by the proprietor or his deputy were binding without the approval of the king.

Yet the proprietor was a vassal of the king and bound in allegiance to him. It was expressly stated in the charter that the province of Maryland was not to be a part of Virginia, but to "be immediately subject to our Crown of England, and dependent on the same forever." The provision that laws enacted by the province should be consonant to reason and not repugnant to the laws of England, would seem to imply a superior political authority which should decide cases of alleged repugnancy. The nature of the imperial system presupposed a hierarchy of sovereign and subordinate powers, which later proprietary charters made explicit. For example, the grant to the Duke of York reserved to the crown the receiving, hearing, and determining of appeals from any judgment or sentence pronounced by proprietary courts; while the charter of Pennsylvania reserved

the right both of hearing appeals and of passing judgment upon all laws. In the course of time the outlines of the imperial system became sharp and fixed, and what was at first only implied became definitely expressed in formal instruments of law.

From the standpoint of political theory it is apparent that proprietary colonies represented a feudal and absolutist system in striking contrast with the more modern and liberal system of chartered colonies. Joint-stock companies might be enlarged by the admission of new stockholders, and colonies based on trading companies tended to evolve into miniature democracies by the admission of freemen and by a consequent subdividing of political authority until it lost its power for evil. On the other hand, proprietary colonies always remained, in theory, feudal principalities, no matter how liberal the proprietors were or how much self-government was accorded to the freemen. Standing in the background was always the universal landlord, with his extensive private holdings and large public powers. It was impossible to democratize such a system. The best that could be done was to enjoin the proprietors to use their vast powers liberally; but whether or not they did so rested finally with themselves. In general, proprietary government was unsatisfactory. A number of colonies found themselves in continual turmoil by reason of a life-and-death struggle between the feudal principle, represented by the proprietor and his deputy, and the popular principle, represented by the assembly of freemen. Gradually palatinates were transformed into royal provinces.

Proprietary colonies left behind the principle that public power was not infrequently related to landed property, and that the private interests of powerful individuals tended to conflict with the public interests of the community. Proprietary government was a remnant of seventeenth-century feudalism. How ill-adapted to frontier conditions it was, is abundantly revealed by the records of strife between people and proprietor which fill the annals of Pennsylvania. In the end the proprietary principle, except for two colonies, was scrapped in favor of the royal principle. Joint-stock companies were easily transformed from private-law institutions into commonwealths. But not so in the case of proprietary colonies; for in them there always remained a feudal residuum which stubbornly resisted democratization. It was never possible to eradicate all reminiscences of the county palatine of Durham. In the nature of things proprietors were powerful, monopolistic, and arbitrary; they had their good points, and some, of course, were more liberal than others. But by and large

the system faced backwards and could not be pivoted around to face forwards; it had to be destroyed, root and branch.

It is unnecessary to describe the system of authority in royal provinces, beyond saying that it was direct. The king stood in the place of the proprietor. He appointed the governor and the council. He might leave a remnant of democratic government, as Charles I did in Virginia when he took over the province after 1624; but this was entirely a matter of grace. Fortunately the custom of allowing a popular assembly even in royal provinces struck root and became universal. Thus a measure of self-government existed in colonies under the immediate control of the king, but it was not completely democratic. The governor and council represented the king's prerogative, and acted for their royal master. Those intermediate bodies between the source of authority and the subjects upon whom the authority terminates, so highly prized by Montesquieu as a guarantee of liberty, were lacking in royal provinces. The subject stood face to face with his sovereign, the governor and council acting in the place of the king. There was no break in the current of authority; it flowed direct and unbroken from the original generator. Trading companies with large powers of self-government dissipated the royal authority, and tempered it to those who under frontier conditions loved liberty more than life. Proprietors, it is true, were intermediaries between king and colony, but, as has been pointed out, they were feudal anachronisms. Lacking intermediate bodies, royal provinces tended to be unstable. There was nothing to temper the rigors of the royal prerogative. It was a choice between submission and revolt. If royal authority was exercised wisely and moderately, submission to it was tolerable; but if it was exercised arbitrarily, the full impact of it was felt by the subjects. Thus two principles of political theory came to stand in opposition to each other: one representing liberty through intermediate bodies, later so highly valued by Montesquieu; the other representing the despotism which always attends the balancing of the royal will against the naked rights of subjects, with no intervening barrier. When a definite orientation of colonial forms of government toward the royal province set in, the issue was joined and had to be fought out to the bitter end.

Thus far we have described only one type of political authority—what might be termed the descending type, because it depends upon grants of power from a superior organ of government to a subordinate one. But the colonial period in America gave birth to another principle, even more important from the standpoint of

political theory; namely, that of ascending authority, the emergence of political sovereignty from a consent of wills. It is none other than the famous principle announced by Thomas Jefferson in the Declaration of Independence, that "governments derive their just powers from the consent of the governed." It was not, of course, an American invention, but the pioneer conditions of American colonial life afforded abundant opportunity to try it out in practice. In those unsettled times it was not always possible to ground governmental control in an instrument of law, carrying a grant of power from some fountain of authority. Government had to be improvised, just as dwelling-places and means of transportation did; and the easiest and most natural method of improvisation was by agreement of parties. Such agreements represented authority as rising from the people themselves, rather than as being superimposed upon them by a sovereign ruler three thousand miles away. The first and best known of them was the Mayflower Compact of 1620. This was a clear case of improvising some form of government. The little band of Pilgrims found themselves beyond the limits of their patent obtained from a trading and colonizing company. Hence they were in a sort of state of nature, insofar as political authority was concerned. Of course, they were still subjects of the king and within his sovereign dominion; but they had no grant of power from him. If the state of nature is what Hobbes thought it was, an absence of positive law, the Pilgrims were not far from it. However that may be in theory, there were some malcontents aboard the ship who were not in sympathy with the lofty spiritual ends of the emigration, and who proposed to take their natural liberty, once a landing was made and nobody was found with authority to govern. To thwart this mutinous movement, it was proposed to establish a provisional government by common consent.

It is not necessary to go beyond the teachings of John Robinson and the Reformed Faith to discover the origin of the Mayflower Compact. The tap-root of it lies in the religious conception of covenanting. The Pilgrims did solemnly and mutually, in the presence of God and of one another, "covenant and combine themselves" into a civil body politic, promising due submission and obedience to just and equal laws made by the majority for the common good. In their hour of necessity they turned for help to their deepest experiences, and these they found to rest in their spiritual communion as a band of separatist believers isolated in the strange land of Holland. The

church at Leyden, in the words of its minister, John Robinson, was a body knit together "in a most strict and sacred bond and covenant of the Lord . . . by virtue whereof we do hold ourselves closely tied to all care of each other's good, and of the whole by every one and so mutually."[2] It was the Old Testament principle of covenanting which had a rebirth in the Reformed Faith, especially in Scotland, where covenants came to have the rank of national constitutions. There was a striking similarity between the separatist band in Holland, cut off from the Anglican Church, and the little band of Pilgrims off the shores of Cape Cod, separated from every recognized government. Each established an organized group and maintained discipline by means of the same principle, the age-old principle of mutual consent, in both instances sanctified by an appeal to God.

Strictly speaking, the Mayflower Compact was an assumption of political authority on revolutionary principles, even though it was made in all loyalty to King James I. It was made by his loyal subjects—at least they so subscribed themselves—but not with his royal assent. He had granted them no charter of government; about all he could be brought to do, indeed, was to connive at their going. Accordingly they had to assume a sort of necessary, objective sovereignty which would serve their purposes provisionally. It was a return, insofar as it was not religious, to the primitive principle of community self-help. It was far from independence, as the terms of the agreement make clear; but it did introduce into America a leavening principle which was destined to undermine the *jure divino* of James I and to uproot the whole system of superimposed authority. Political authority from below is incompatible with political authority from above; it is impossible to reconcile them. In the Declaration of Independence the former principle triumphed—government by consent. Thus from early colonial times, as exemplified in compacts such as those made in the cabin of the Mayflower, and by the people of Connecticut and New Haven, of Dover and Exeter, of Providence and Portsmouth, it has remained a fixed principle that government is not a vested right; that those who govern must look for their delegated authority to those who are governed; that the justification of government and the obligation of obedience find their ultimate sanction in a consent of wills.

[2] *Bradford's History of Plimoth Plantation* (reprint, 1901), p. 42 (spelling modernized).

III. Changing Forms of Government

Colonial conditions provided a fertile field for experimentation in forms of government, and as conditions changed new forms came and went in rapid succession. The prime desideratum in the beginning of a colony is effective administration. To secure a foothold in new surroundings and perhaps in the face of hostile natives, colonies at first tend toward a quasi-military organization. Powers of government are concentrated in the hands of a few, commonly those who have had military experience. In short, early colonial government is aristocratic. When to the natural necessity of effective administration there is added a theocratic strain, as was the case in Massachusetts Bay, the result is a narrow oligarchy. Proprietary colonies in America began as feudal principalities, the governing power being identical with the landlord and shared in part with the freemen. Time and effort were required to break that unholy alliance. Royal provinces could scarcely be democratic in the seventeenth century, although Charles I did retain the assembly in Virginia when he transformed the chartered colony into a royal province. The evolution of colonial governments from narrow aristocracies to broad-bottomed democracies may be sufficiently illustrated by sketching rapidly the governmental changes that took place in three colonies; namely, Virginia, Massachusetts, and Pennsylvania.

Virginia.—The form of government established in Virginia by the charter of 1606 was aristocratic. Indeed, it was royal government through a council. But as early as 1608 and 1609 protests against the narrow and illiberal character of the charter began to be made by such men as Archer, Martin, Newport, and Ratcliffe. The king was petitioned to grant a charter with more ample powers and privileges—in particular, the right of incorporation, extension and more precise delimitation of boundaries, government of the colony by an incorporated company, and relief from fiscal burdens. The petition was granted and a new charter passed the seals in 1609. With the granting of this second Virginia charter English colonial policy, on its legal side, began to take shape. An incorporated trading and colonizing company was given free and absolute power to govern and rule, with the sole restriction that laws made by the corporation should not contravene the laws of England. Obviously this meant self-government for the London and Plymouth Companies; but it did not mean immediate self-government for Virginia. The colony was not identical with the company.

The latter was composed of "adventurers" who risked their capital in the new enterprise, and as a matter of fact lost it; the former consisted of settlers, planters who dared to cross the ocean for the purpose of clearing forests and breaking new ground. Not until the planters in Virginia gained a voice in the management of public affairs could it be said that the colony was self-governing. Toward this objective the management of the London Company slowly made headway, thanks to the progressive and liberalizing influence of Sir Edwin Sandys. It was in the year 1618 that the London Company issued what was fondly called the "Magna Charta of Virginia." This granted to the planters a share in government through an assembly composed of two burgesses from each plantation, elected by the inhabitants thereof, together with the governor and council. The first assembly was called by Governor Yeardley in 1619. At the outset it adopted a broad conception of its powers, so broad, indeed, as to make them almost co-extensive with those of a parliament. It assumed the right to judge of the elections of its members, and to exclude delegates under the terms of the patent. It enacted a wide variety of laws, and concluded its session by petitioning the London Company, among other things, to make good its promise to grant to the colony the right of review and ratification of the orders of the company, just as the company claimed the right of review and ratification of the acts of the assembly. That was hastening fast toward the goal of colonial self-government—too fast, indeed, as events proved. The liberality of the company in making such a promise was so far ahead of the thought of the times as to excite the suspicion of that arch-champion of superimposed government, James I, who immediately set about to annul the charter. This he was able to accomplish by writ of *quo warranto* in 1624, but not before there had been embedded in the political consciousness of the burgesses of Virginia the principle that those who risked their lives in colonizing should have a voice in management quite as certainly as those who risked their capital. The principle of popular participation in government through elected representatives had come and, as events proved, had come to stay. Under royal government, begun anew in 1625, the governor, council, treasurer, and secretary of state, elected by the company under the charter just annulled, were now appointed by the king. However, what proved to be the driving-wheel of the future machinery of the colony was, for one reason or another, left intact, save for one slight modification, namely, the House of Burgesses. Whether or not James I would have left it standing is problematical; but he died shortly after he had destroyed

the earlier work of his hands, and it was left to Charles I to re-introduce royal government.

The stages of the evolution of governmental forms in Virginia were, then, as follows: (1) monarchical government under the crown through a council, established by the charter of 1606; (2) liberal self-government by the London Company, shared by the planters on the ground, established by the charters of 1609 and 1612; and (3) resumption of government by the crown in 1625,[3] but modified in the direction of popular representation. The liberal policy of the London Company had left too deep an impress upon the thought of the time to be easily erased. The royal government of Charles I was very different from the royal government of James I. The principle of the consent of the governed had been injected into the system, and it was to work so potently and persistently as to destroy all that the crafty James I had so carefully planned. James made his fatal mistake when he granted the second charter of Virginia; for, as the sequel proved, neither he nor his successors could undo that work of liberalization. All attempts in that direction were as futile as those of King Canute; for the rising tide of self-government was not to be stemmed.

Massachusetts Bay.—The colony of Massachusetts Bay was peculiarly fortunate in working out its forms of government by reason of the transfer of the charter. By this act the company, with its seat originally in England, became identical with the colony on the ground. The charter took root in the soil, so to speak, and blossomed into the fundamental law of a commonwealth. Questions of political organization and forms of government now found their answer in an interpretation of the charter. Here was the battleground between the conservative, theocratic elements, on the one hand, and the liberal and popular elements, on the other. There could be only one outcome to this struggle; the rising frontier democracy was not to be suppressed.

At first the governor and assistants assumed the right to make laws and levy taxes. It was intended by those who drew up the charter that their functions should be primarily executive and judicial; but conditions seemed to justify them in acting for the corporate body. Moreover, the members of the company were indifferent about asserting their rights under the charter, being busy with getting started in a new land. In fact, they soon relinquished to the assistants the right to choose from among themselves the governor and deputy-governor who with the assistants were to make the laws and select the

[3] It was not until 1627 that Charles I formally assented to the continuance of the House of Burgesses.

officers to execute them. That is to say, the members of the company acquiesced for a time in the semi-patriarchal form of government which early developed. But after a period of about two years the system of government by trustees began to be challenged by the freemen, who had now come to form no inconsiderable body, and the authority of the politico-ecclesiastical monopoly began to crumble. The first step in the breakdown of the oligarchy was the reclaiming by the freemen of their right under the charter to elect the governor, as well as the assistants. In 1632 it was agreed that the governor and assistants should be chosen annually by the General Court, the governor always from among the assistants.[4] This victory amounted to a partial recovery by the freemen of their charter rights; and it curtailed by so much the power of the close corporation.

Not satisfied with the power of electing their governor, the freemen pressed on for a share in legislation. They appointed a committee to wait on the governor and demand a sight of the patent for the purpose of ascertaining if all laws should not be made in general court. Governor Winthrop conceded the point that the freemen were to join the magistrates in making laws, and suggested representation as the best means of enabling the whole body of freemen to participate. However, he counselled temporary delay. But six weeks later it was ordered that four general courts should be held each year and that the towns should send deputies to assist in making laws and disposing of lands.[5] The whole body of freemen was to assemble but once a year, and then for the purpose of electing the magistrates. Thus rights under the patent providing that there should be one general court a year, and that freemen should participate in the election of magistrates and the making of laws, were fully restored. The oligarchy had cracked.

So far the intent of the patent was clear. Governor Winthrop and the ecclesiastical hierarchy, contemptuous of democracy though they were, accepted the decision with becoming grace; for they were well aware that the patent was on the side of the freemen. But when a question arose over the veto of the magistrates, a matter on which the patent was vague, the oligarchy held its ground stubbornly. What majority was to be decisive? Was it to be the numerical majority of the General Court composed of governor, assistants, and freemen acting as one body? Or was it to be a double majority, that of the freemen as a body and that of the governor and magistrates acting as

[4] Winthrop's *Journal* (2 vols. 1908), vol. I, p. 79.
[5] *Ibid.*, vol. I, p. 125.

a second house? Under the rule of a numerical majority it was apparent that the governor and magistrates would be hopelessly swamped; but under the rule of a double majority, the General Court being divided into a bicameral legislature, the magistrates could retain their negative. The first skirmish, in 1634, resulted in favor of the magistrates, who kept their negative. In 1644, on a motion of the deputies, the General Court was divided into two branches: the magistrates forming a senate, and the deputies a lower house.[6] To enact laws it was necessary that both should agree, which was tantamount to giving the magistrates a veto. Thus came about a bicameral form of legislature, with a veto in the upper house.

Emboldened by past successes, the freemen now pressed on to new conquests. They challenged the arbitrary power of the magistrates, pointing out that the latter derived their authority from the people, and that the nature of their office was ministerial. They proposed that a commission composed of magistrates and deputies should be appointed and vested with authority to act during recesses of the General Court. The next demand was for a body of written laws to curb the discretionary power of the magistrates. Certain persons were called upon to draw up a body of positive laws to serve as a basis of their legal system. At length, in 1641, after much discussion involving some fundamental issues, a code entitled a "Body of Liberties" was drawn up and adopted. In this way the narrow oligarchy of the early days was gradually shorn of its semi-patriarchal powers, and what was left of it took its place along with the representatives of the people. Even so, however, the base of the commonwealth was still narrow, because only members in good standing of the Congregational church might be admitted as freemen. The narrow governing oligarchy had been shattered, but for some years the commonwealth itself remained a close political corporation. The loss of the charter in 1684 and subsequent developments are in the domain of American history. The germinal development of liberty and self-government took place in the period from the transfer of the charter in 1630 to its annulment by writ of *quo warranto* in 1684.

Pennsylvania.—In Pennsylvania the perennial problem was that of reconciling the feudal principle of proprietary government with the growing spirit of democracy fostered by colonial conditions. In theory they were irreconcilable, for the one faced the past and the other faced the future. Proprietary government stood for large powers vested in a universal landlord whose interests might or might not

[6] Winthrop, *op. cit.*, vol. II, p. 164.

coincide with those of the inhabitants of his vast private domains. How to balance proprietary interests against popular interests, so as to give each a share in the government and allow neither a monopoly, was a problem of no mean proportions. William Penn was an able and liberal man, and he did his best to make the adjustment; but he was working with feudal intruments. His successors lacked his finer qualities, and through their narrow-minded stubbornness they all but wrecked the whole enterprise.

However anti-feudal and democratic the personal views of Penn may have been, he held it necessary to attract to his "holy experiment" men of wealth who would purchase large tracts of land. Probably for this reason he reserved in his governmental system a place for the few, preëminent in "wisdom, virtue, and ability." The driving-wheel of his political machinery was a council, at first of seventy-two, later of eighteen members, to be elected by the freemen for their special and conspicuous ability, and to be renewed by thirds every year. It was expected that this council would represent the landed interests. Over against it was set an assembly which for the first year was to consist of all the freemen of the province and thereafter of two hundred members, later reduced to thirty-six. The council was charged with the duty of proposing measures to the assembly, the function of the latter being only to accept or reject, with the right of recommending bills and amendments. This was what Penn styled law-making "by the governor with the assent and approbation of the freemen in provincial council and general assembly." In the council Penn reserved for himself, or for his deputy, only three of seventy-two votes—which was far enough from the absolute negative to which as proprietor he was entitled.

The turning-point in feudal Pennsylvania came in 1696, when as a result of disputes between the council and the assembly, and of Penn's loss of prestige at court, the positions of the Provincial Council and the General Assembly were reversed, the latter now preparing and proposing measures, and the former being limited to accepting or rejecting, with the compensatory right of suggesting amendments and even recommending bills. This was the beginning of the ascendency of the assembly which was to last until the Revolution. It was described as law-making "by the governor, with the assent and approbation of the freemen in the General Assembly met." Now that the council was no longer the driving-wheel of the machinery, the proprietor retook this power of veto as a means of maintaining the balance between proprietary and popular interests. It is true that the governor

and council might still dismiss the assembly, so that in an emergency they still had the upper hand; but such procedure came to be looked upon as exceptional rather than normal. The legislative supremacy tended to gravitate more and more into the hands of the General Assembly.

The climax of this development was reached in 1701, when as a result of constant dissension and strife between the council and the assembly Penn was obliged to grant new concessions to the popular party led by David Lloyd. A conference committee representing the two elements in the province drew up a form of government which established a unicameral legislature. To the General Assembly were committed powers strikingly similar to those of a parliament; namely, (1) the right to choose a speaker and other officers; (2) to judge of the qualifications and elections of their own members; (3) to decide upon adjournments; (4) to appoint committees; (5) to prepare bills with a view to enacting them into laws; (6) to impeach criminals and redress grievances; and it was added that the General Assembly "shall have all other powers and privileges of an assembly, according to the rights of the freeborn subjects of England, and as is usual in any of the king's plantations in America." As an organ of legislation, the council was a thing of the past. Thereafter it was appointed by the governor, representing the proprietor, and served only in an advisory capacity.

In all of Penn's "frames" of government a clear distinction was made between fundamental and statute law. In the first "frame" (1682), Penn established the principle that no act, law, or ordinance could "alter, change or diminish the form or effect of this charter" without the consent of the governor and six-sevenths of the council and assembly. This provision, safeguarding the basic law against hasty and ill-considered amendment, was incorporated in subsequent instruments of government. Furthermore, Penn bound himself and his successors to observe the charter of liberties (1682) on pain of having his acts declared of no force and effect. Similar guarantees occur in later charters. In one instance the proprietor proposed a body to be known as "conservators of the charter," composed of twelve landlords and himself, whose duty it should be to pass upon the agreement of laws and ordinances with the charter, and to declare such as contravened the fundamental law null and void. There still remained, of course, the charter granted by Charles II to William Penn. To this document the descendants of Penn appealed in their struggle against the "frame" of 1701, alleging that the latter went beyond

the limits of the charter of the province in conferring powers upon the assembly. Thus there were charters within charters, and all of them were regarded as more fundamental and binding than ordinary acts of legislation. To the charter of the province the heirs of Penn appealed; to the charters granted by the proprietor the popular party appealed; and so the struggle continued.

An interesting sidelight on proprietary government in Pennsylvania is preserved in Benjamin Franklin's comments in the Federal Convention. When the question of an executive veto was under discussion, Franklin spoke against the proposal to clothe the executive with such power, supporting his argument by the experience of Pennsylvania. "No good law whatever could be passed without a private bargain with him [governor representing the proprietor]. An increase of his salary, or some donation, was always a condition; till at last it became the regular practice to have orders in his favor on the Treasury presented along with the bills to be signed, so that he might actually receive the former before he should sign the latter."[7] In fairness to the name of William Penn it should be added that the proprietors whom Franklin knew and disliked were the successors of the founder of the colony, and that they lacked many of the qualities of the man who was the inspirer and promoter of the "holy experiment." There were two sets of interests in Pennsylvania represented by two factions or *blocs,* and between them there existed unending political war. It was almost too much to expect that any form of government would function well under such conditions.

Penn was a curious combination of dreamer and practical man of affairs. Wishing to attract men of wealth who might purchase large tracts of land, he made a place in his governmental system for men of outstanding ability, at a time when the possession of ability was closely associated with the possession of property. On the other hand, he had a penchant for theorizing and moralizing about matters of government. His political philosophy bore unmistakably the earmarks of James Harrington's influence. To Harrington the problem of government was one of organization—the problem of so distributing powers as to effect a correlation between landed property and political authority. While in theory Penn disparaged forms of government, exalting men above political machinery, in fact he himself did a deal of tinkering with constitutions. He multiplied "frames" of government. He would try and try again, until he got the right com-

[7] Max Farrand, *The Records of the Federal Convention of 1787* (3 vols., 1911), vol. I, p. 99.

bination where "laws rule and the people are a party to those laws." Harrington suggested, as a means of bringing about an "empire of laws," a specialization of functions according to which a council, representing wisdom, should propose and debate measures, while an assembly, representing interest, should accept or reject them. This scheme of proposing and resolving was incorporated by Penn in his first "frame." Harrington advocated rotation in office, use of the ballot, and a close relationship between property and power. In all of these particulars Penn's "frames" constitute a reflection of Harrington's political philosophy. In truth, the *Oceana* came to life in Penn's Woods.

IV. Church and State

It was inevitable that the relation of church and state would have to be defined in the colonies, because religious fervor was prominent among the impelling causes of colonization. Besides the prospect of founding a "New Britain," it was hoped by many that the Kingdom of God on earth might receive a new extension. Some there were who had fled from religious persecution; they sought and prized above all else freedom of worship. The institutional expression of the religious motive was the Christian church, which was planted by the side of the State and flourished under its *ægis*. Church covenants and plantation covenants were but two varieties of the same species, and both sprang from the same soil. Hence no discussion of the political theory of the colonists would be complete without at least a reference to that companion institution of the state, the church, which at times seemed even to play the more important rôle. Since it was the separatist churches of New England that had the most room for institutional development, owing to the circumstances of their origin, attention will here be focused upon them.

The church of Puritan Massachusetts was a company of saints united by covenant in one body for public worship and mutual edification.[8] The essential factor in it was the church covenant, whereby all communicants agreed to give themselves up to the Lord and "to the observing of the ordinances of Christ together in the same society." Thus it was mutual agreement which gave form and substance to the church body. To this extent, therefore, the church was a voluntary institution; but its actual form and pattern were

[8] Cotton Mather, *Magnalia Christi Americana* (2 vols., 3rd edit. 1852), vol. II, p. 213.

held to be prescribed in the Scriptures, and not left to human discretion. It was not in the power of men "to add or diminish or alter anything in the least measure therein." If elders and deacons were chosen and ordained, it was because such officers appeared to be sanctioned by the Word of God; and in choosing them the people were acting by the authority of a higher power, so that their choice was only an outward and formal ratification of an anterior choice made by the great Head of the church himself.

The authority of the church rested in part upon divine commission, in part upon mutual consent, and in part upon a certain right inherent in all bodies to preserve themselves from disintegration. This authority was exercised through a mixed form of government: the Head and King of the church represented monarchy; the elders in their presbyteries represented aristocracy; and the body of believers, or brotherhood, represented democracy. To the brotherhood was committed the right to choose elders and deacons, to admit new members, and even to remove the unworthy, lay and clerical. The ideal was a church democracy in which the elders solicited the concurrence and consent of the brotherhood in all important matters—an organic church in which rulers and ruled formed one body and were of one mind.[9] But in practice it seems that the ministers occasionally proceeded to important business without consulting the brotherhood. The same principle of democracy was aimed at in the relations among the congregations. There was no ecclesiastical hierarchy, either papal or presbyterian, and there were no gradations of power or superiority. All churches stood on an equal footing. If there were inter-church gatherings, they took place only for consultation and recommendation—merely occasional councils for advice and admonition, with nothing to be determined by way of discipline or authority. Synods might be necessary for clarifying truth and maintaining peace, but their determinations were to be accepted by the church only if consonant to the Word of God. Of course, a congregation that refused to listen to admonition might be gently urged by means of non-communion, a sort of ecclesiastical boycott. Such was congregationalism.

In the congregational theory civil magistrates occupied a high place and performed a useful function. To the Puritans nothing was entirely secular; all life was suffused with religion. Even the civil order they held to be a part of a larger spiritual kingdom. After the manner of the Church Fathers, they looked upon government as an

[9] Cotton Mather, *op. cit.*, vol. II, pp. 222–24.

ordinance of God for the good life; magistrates were ministers of God who should be a terror to evil-doers; courts of law should guard the spiritual estate of the people as they guard their temporal estates. The line of demarcation between the spiritual and the temporal was so dim that it was very easy to construe an offense against the spiritual order as one at the same time against the temporal order. When all life is saturated with religion, even heresy is easily interpreted as a civil offense. It tends to destroy the peace of the community, because the community rests upon orthodoxy, and the introduction of heterodoxy undermines the foundations. Roger Williams challenged both the ecclesiastical and the political order in Massachusetts Bay; but if he had challenged only the ecclesiastical order he might, under the Puritan theory, have been dealt with as a disturber of the state, so close was the connection between them.

It is not surprising, then, that we find the magistrates of Massachusetts Bay taking a deep interest in matters ecclesiastical. They called the churches together in synods; they intervened in questions of doctrine; they passed judgment in cases of heresy and banished heretics from the colony; they exhorted ministers to diligence in catechizing the people. The General Court of Massachusetts ordered the county courts to charge themselves with having "the Indians residing in their several shires instructed in the knowledge and worship of God." Magistrates were thus concerned with matters of religion, with the first table of the law. It was their right and duty to restrain and punish "idolatry, blasphemy, heresy, venting corrupt and pernicious opinions that destroy the foundations, open contempt of the word preached, profanation of the Lord's Day, disturbing the peaceable administration and exercise of the worship and holy things of God. . . ." [10] They should compel schismatical churches to return to the right path.

But the church was not the state. Civil magistrates acting in religious matters could act only in a civil way, commanding or forbidding things respecting the outward man only. They could not reach the inner life, such as unbelief, hardness of heart, or erroneous opinion unexpressed; nor was it their function to try to do so. They might convoke a synod of the churches, but they could not constitute it an ecclesiastical body. That had to be done by ecclesiastical officers. ". . . the constituting of a synod is a church act and may be transacted by the churches even when civil magistrates may be

[10] Cotton Mather, *op. cit.*, vol. II, p. 236.

enemies to churches and church assemblies.'' [11] Nor could civil magistrates choose church officers. The church was free to constitute its own government, select its own officers, and regulate its own internal affairs. Church censures carried with them no civil disability. In brief, the state was to act in matters of religion in a civil way only. So long as it confined itself to civil modes of procedure it could take cognizance of almost anything pertaining to religion, from idolatry to order in a house of worship.

The modern conception of the state as a juristic person, functioning principally as an instrument of law, was entirely foreign to the Puritan mind. In that Calvinistic type of thinking the state was to serve as the handmaid of the church in the important work of ushering in the Kingdom of God on earth. Its sphere embraced not only civil rights and duties, but also religious rights and duties. The only restriction imposed upon its activity was that it should proceed in a civil way, beginning always with an overt act. The distinction between the sphere of the church and the sphere of the state was the inner and the outer life, and not, as it is today, between legal rights and moral duties. Morality was confused with legality in the minds of the Puritans, who derived their political philosophy, as they derived their religion, from the Scriptures; and naturally there was a certain sameness about it. Both church and state were regarded as divine ordinances; both guarded the true worship of God and promoted the good life; both advanced the Kingdom of God, the one in a civil way, the other in an ecclesiastical way. But they were distinct and separate organizations, differing in their constitution and modes of procedure. The state was united to religion but not to the church. Religion is a principle; the church, an institution.

In actual operation, it is true, the church and state of Puritan Massachusetts were closely allied. With such forceful characters as the Reverend John Cotton, and the Mathers, Increase and Cotton, in the midst of a small commonwealth, it was inevitable that ministers should have much to do with civil government. Cotton especially was a man who could not be ignored even by governors. His counsel was sought on most important occasions. He even went so far as to envisage ministers as a body in public law, exercising a check on both magistrates and people. He was politically minded and had a flair for law and public administration. In the new and unsettled conditions of the time Cotton came to be a sort of unofficial adviser to the governor and council, a kind of reverend attorney-general for the colony. Thus while in theory the church and state of New

[11] *Op. cit.*, vol. II, p. 234.

England remained separate institutions, each with its own constitution and procedure, in practice there was not a little commingling of ecclesiastical and political elements. In Massachusetts Bay and in New Haven citizenship was based upon membership in the Congregational church. Ministers were sometimes elected in town meetings, and freemen were taxed for the support of the church. The all-inclusive universe of the Calvinist was the Kingdom of God, which he might have symbolized by an ellipse with two foci, the church and the state.

V. Imperial Relations

The imperial problem in colonial days was three-sided, involving the royal prerogative, popular colonial assemblies, and intermediate bodies or persons such as trading corporations and proprietors. In some colonies the relation between the crown and the popular assemblies was direct, as in the royal provinces; in others it was indirect, as in the chartered and proprietary types. The trend of development, influenced by considerations of both trade and defense, was away from the indirect relationship between crown and colony and toward direct control by royal governors. That is to say, intermediate bodies which had served as a liaison between king and plantation gradually disappeared, leaving the king face to face with his subjects. At the time of the Revolution there remained but two chartered colonies and two proprietary colonies, all the others having been transformed into royal provinces.

Colonizing was, as John Adams observed, a *casus omissus* at common law; that is, there were no provisions for governing colonies beyond the seas. The king by his prerogative might permit or forbid the emigration of his subjects. But while with his consent his subjects were free to leave the country, they could not remove themselves beyond the pale of allegiance to him. By the early charter of 1577, granted by Queen Elizabeth to Sir Humphrey Gilbert, the allegiance of the settlers was reserved. It was also expressly stated that the colonists were to enjoy the rights of "free denizens and persons native of England." King James I, in his first charter of Virginia, refers to traders not members of the prospective colony as "strangers, and not subjects under our obedience." It is plain that the colonists were by contrast, in contemplation of the king, to be subjects under his obedience. To his subjects in the several colonies, as well as to their children, James granted "all liberties, franchises and immunities within any of our other dominions, to all intents and purposes as if

they had been abiding and born within this our realm of England, or any other of our said dominions." Charles I, in granting feudal rights in Maryland to Lord Baltimore, reserved to himself "faith and allegiance and sovereign dominion." Charles II, in granting similar rights to William Penn, reserved faith and allegiance, not only of Penn and of his heirs and successors, but also of the tenants and inhabitants of the territory, retaining also sovereignty. It is clear, therefore, that English colonists were English subjects owing allegiance to their king. Sovereignty and lawful prerogative remained in the crown.

To what extent were the English colonists subject to English law? This is a moot question most difficult to answer. The colonists themselves did not agree in the matter. Among them, indeed, there were two extremes of opinion, with mediate views between. On the one hand, it was contended that the colonists were bound by all the laws of England, common and statute; on the other, it was asserted with equally firm conviction that they were not bound by any laws of England save those adopted by colonial assemblies. Modifications of these extreme views found champions who insisted that laws of England took precedence, and that only in their absence was colonial law to be effective; and just the reverse, that colonial law took precedence, and that laws of England were binding only in the absence of local laws.[12] It was the legal opinion in England in the eighteenth century that acts of Parliament in which the colonies were not named could not be enforced in the colonies in the absence of action by local assemblies. In Penn's charter it was expressly stated that the laws of England relating to property, descent of lands, enjoyment and descent of goods and chattels, as also certain criminal laws, should be the laws of Pennsylvania and should continue until altered by the proprietor and freemen. As the revolutionary movement began to acquire momentum, it became customary to emphasize the voluntary character of English law, and the fact that insofar as it was binding it was founded upon consent. John Adams voiced this opinion: "Our ancestors were entitled to the common law of England when they emigrated, that is, to just as much of it as they pleased to adopt, and no more. They were not bound or obliged to submit to it, unless they chose it."[13]

[12] Charles M. Andrews, *The Colonial Background of the American Revolution* (1924), p. 59.

[13] *The Works of John Adams*, edited by C. F. Adams (10 vols. 1856), vol. IV, p. 122.

Whatever the colonists may have thought concerning the relation of English to colonial law, they were fully informed on one point, namely, that colonial laws which contravened the laws of England were null and void. The idea of fundamental law was quite familiar to them. Chartered colonies were bound by the instrument of their origin not to pass laws repugnant or contrary to the laws of England. Proprietors were laid under the same obligation, and in much the same terms. Lord Baltimore, for example, was granted full, free, and absolute authority to make laws, provided they were "consonant to reason and not repugnant or contrary, but (so far as conveniently may be) agreeable to the laws, statutes, customs and rights of this our Kingdom of England." In royal provinces, of course, local assemblies were bound not to legislate contrary to the laws of England. In fact, this requirement was so general that it was considered a part of the constitution of the Empire. In 1775 Lord Mansfield gave it as his opinion that even in the absence of charter restrictions colonial assemblies could not legally legislate contrary to the laws of England.

The conception of fundamental law presupposes a superior organ of review, political or judicial, or even a combination of both. In England the King in Council performed the function of passing upon colonial laws and disallowing such as encroached upon the royal prerogative, or such as were contrary to acts of Parliament or prejudicial to the interests of British merchants. Some of the colonies were obliged to transmit their laws to the king for the purpose of review. Others were not so obliged; but while their laws were not transmitted, they might be challenged for repugnancy, just as might those of the transmitting colonies; and to the King in Council belonged the right to decide. The whole matter of review, as also of appeal, seems to have been inherent in the constitution of the Empire. Some charters ignored it, while others contained express restrictions. In fact, the constitution of the Empire was a slow growth and its outlines became much sharper and more clearly defined with the passing of the years. Two proprietary charters will suffice to illustrate this tendency. We find that the charter granted to Lord Baltimore in 1632 contains no provision concerning either the transmission of laws or the right of appeal from proprietary courts; but the charter granted to William Penn in 1681 is very explicit on both points. Penn was obliged to transmit to the Privy Council a duplicate of all laws passed in the province, within five years of their enactment. If within six months after they had been received they were

found to be "inconsistent with the sovereign or royal prerogative of us" they were to be declared as thereafter void. It was in the nature of a royal repeal, since the law was not null and void *ab initio*. Likewise reserved to the crown were the hearing and determination of appeals.

It seems to have been commerical interest that brought out this phase of the constitution of the Empire. In 1675 a committee of the Privy Council, called the Lords of Trade, was appointed. This committee began, and its successor, the Board of Trade, continued, a policy of centralization which tended to bring colonial laws and appeals from colonial courts before the King in Council. Uniformity and centralization were necessary for the enforcement of acts of trade and for defense. Thus the imperial system was tightened up during the last quarter of the seventeenth century; or perhaps it might be said that what was at first implicit later became explicit and formal. Charters reflected the change of policy. The Board of Trade developed a fixed procedure. Colonial laws were referred by the Board of Trade to the attorney-general and solicitor-general for a report on their conformity with the laws of England. On the basis of the report made, the Board of Trade sent the laws to a Committee of the Privy Council for Plantation Affairs, which in turn reported to the King in Council. There the final decision was made; the laws were either approved or disallowed, and the disposition of appeals was determined. The political repercussions of this policy, inaugurated in the interests of British merchants and for defense, were destined to be far-reaching and fatal to that very trade monopoly which was so dear to the hearts of those who had inspired the innovation. Friction was sure to develop just as soon as the nature of the Empire became clear, because the colonial assemblies were not at all careful to legislate in accordance with the navigation laws of England.

The policy of the Lords of Trade and the Board of Trade tended to squeeze out intermediate colonial bodies in the form of chartered corporations and feudal proprietors. British trade interests demanded a strict enforcement of navigation acts, and this could best be accomplished, it was thought, by immediate government on the part of the crown. Hence a policy of progressive royalization was pursued from 1675 on. The crown was thus brought face to face with colonial assemblies. The whole imperial question began now to turn on the nature of these assemblies and their attitude toward the home government. Had they conceived themselves at all times as subordinate political bodies, such as English boroughs, municipal corporations,

or trading companies, there might have been little friction. But they took a much more exalted view of themselves; they would be miniature parliaments, with rights and privileges similar to those of the House of Commons; in fact, they would be coequals of the British lower house. They would recognize the king as their common sovereign, a golden link of empire, but they fast developed a conception of legislative competence that was incompatible with any idea of the Empire as a unitary state. It came about in time, partly owing to the prompting of British merchants, that the king and his ministers were unyielding; the colonies had to recognize their inferior and subordinate position or else feel the full weight of the royal prerogative. The outcome of that struggle is well known. Here it is necessary merely to outline this tendency on the part of local assemblies to assume parliamentary powers.

It began early. The Virginia House of Burgesses, as has been pointed out, viewed its legislative competence much as that of a parliament. In Massachusetts Bay, in 1692, the governor and assistants took pains to instruct the good people of Watertown on the character of their government, bringing to their attention the fact that it partook of the nature of a parliament. The citizens of Watertown had registered a protest against paying a levy of eight pounds to be used in fortifying a new town (Cambridge), on the ground that the governor and assistants had no authority to raise money by levy. Haled before the governor and council, the leading citizens, clergy and laymen, were shown the error of their way. "The ground of their error was," according to Governor Winthrop, "for that they took this government to be no other but as of a mayor and aldermen, who have not power to make laws and raise taxations without the people; but understanding that this government was rather in the nature of a parliament, and that no assistant could be chosen but by the freemen, who had power likewise to remove the assistants and put in others, and therefore at every general court (which was to be held once every year) they had free liberty to consider and propound anything concerning the same, and to declare their grievances, without being subject to question, or etc., they were fully satisfied; and so their submission was accepted and their offense pardoned."[14]

In 1641 the General Court of Massachusetts adopted a code of laws which went far toward supplying a legal foundation for their miniature state. Recourse was had to the Word of God to remedy defects. The section on criminal law was lifted bodily from the Pentateuch.

[14] Winthrop's *Journal*, vol. I, pp. 74–75.

When the question of drawing up a code was being discussed, objections were raised on the ground that "it would professedly transgress the limits of our charter, which provide, we shall make no laws repugnant to the laws of England, and that we are assured we must do." It was suggested that laws be developed by custom and practice, which would be no transgression, at least in form. But the objections were overruled, and the code was adopted. The point is that shortly after the founding of the colony the General Court was presuming to do for Massachusetts, in a modified form, what Parliament was doing for England. Perhaps as if to lessen the shock, the code was ingeniously styled a "Body of Liberties," and one of the closing sections, calling attention to the title, exhorted all persons in authority, "to consider them as laws," although "not in the exact form of laws or statutes." In 1697 the lower house of Maryland declared that "this general assembly is in like nature of the Parliament of England as to this province." William Penn likened his proposed assembly to "an English House of Commons" elected yearly, and after considerable experimentation the assembly of Pennsylvania did evolve into something very similar to a parliament.

Thus a progressive polarization of colonial thought and practice around the royal prerogative, as one focus, and around the legislative competence of the local assemblies, as the other, went on apace. Intermediate bodies, except in four colonies, disappeared. Either the king and his ministers had to adopt a broader view of the nature of the Empire, one that would provide for a large measure of local autonomy, or else colonial assemblies had to descend from the high ground they had occupied. A lack of far-seeing and liberal statesmanship prevented the former, while a growing colonial consciousness, reflecting a set of colonial ideas and interests divergent from those of British statesmen and merchants, prevented the latter. Moreover, by the second half of the eighteenth century the question of parliamentary supremacy contributed not a little to further complications.

READING NOTES

There is no lack of material on colonial America. Through the efforts of state historical societies and state legislatures, sometimes working conjointly, invaluable collections of colonial records and laws have been made, such as the *Collections of the Massachusetts Historical Society,* the *Pennsylvania Colonial Records,* the *Archives of Maryland,* the *Collections of the New York Historical Society,* and records published by the Virginia State Library under the editorship of H. R. McIlwaine, entitled *Journals of the*

House of Burgesses of Virginia, and *Legislative Journals of the Council of Colonial Virginia.* The Narragansett Club of Rhode Island has aided the student of history and government by making available the important writings of Roger Williams. Governor Winthrop's *Journal,* or "History of New England", is a book of source material from which one can piece together the story of how a commonwealth evolved from a chartered trading and colonizing company. In view of the attention which has been given in recent years to the British side of the controversy between the mother-country and the colonies, the *History of the Province of Massachusetts Bay,* compiled from manuscript by a distinguished loyalist, Thomas Hutchinson, governor of the province from 1771 to 1774, constitutes an important source. Volume I appeared in 1764, Volume II in 1767, and Volume III in 1769. Although the diffuse, rambling, and inaccurate *Magnalia Christi Americana* of Cotton Mather, which was published in folio in 1702, may have but little value for the chronology of the historian, it does shed light on the relations between church and state in early New England. In Justin Winsor's *Narrative and Critical History of America,* a large coöperative work in eight royal octavo volumes completed in 1889, is to be found a vast store of information on the beginning and development of the American nation. Useful source material on the founding of Virginia has been compiled by Alexander Brown in *The Genesis of the United States* (2 vols. 1891), and *The First Republic in America* (1898). In a later volume, *English Politics in Early Virginia History* (1901), Mr. Brown brings together the results of his investigations to prove that certain historic wrongs have been done Virginia by the writers of history. Aside from the obvious patriotic motive which inspires all his work, Mr. Brown rendered a commendable service to scholarship by bringing to light material which had previously been locked up in manuscripts and foreign languages, and by reprinting material which had been unavailable in America. Students of American history and government owe a debt of gratitude to William MacDonald for having put within easy reach a wealth of documentary sources in *Select Charters and Other Documents Illustrative of American History, 1606–1775* (1804), *Select Documents Illustrative of the History of the United States, 1776–1861* (1907), and *Select Statutes and Other Documents Illustrative of the History of the United States, 1861–1898* (1903) Professor MacDonald has made a new selection for elementary courses of a comprehensive character in the *Documentary Source Book of American History, 1606–1913* (1917).

The best comprehensive study of the American colonies is the product of the sound scholarship and tireless energy of Herbert L. Osgood. It is a monumental work on the colonies as institutions of government, and their place in the nascent British Empire. It consists of two series, *The American Colonies in the Seventeenth Century* (3 vols. 1904–1907), and *The American Colonies in the Eighteenth Century* (4 vols. 1924). Another study on colonial government is the *History of Proprietary Government in Pennsylvania,* an exhaustive and illuminating treatment by William R. Shepherd,

found in the Columbia University Studies in History, Economics and Public Law (1896). For clear and beautiful style, the works of John Fiske leave little to be desired. On the colonial period see his *Beginnings of New England* (1889), *Dutch and Quaker Colonies* (1899) and *Old Virginia and Her Neighbors* (1900). The contribution of Quakerism to the government of Pennsylvania is lucidly and succinctly set forth by President Sharpless in *A Quaker Experiment in Government* (1898). With ripe scholarship and fine historical balance, Charles M. Andrews explains colonial history in terms of imperial relationships in *The Colonial Background of the American Revolution* (1924). Other contributions by the same author to an understanding of the beginnings of America are *The Colonial Period* (1912), *Colonial Folkways* (1919), *The Fathers of New England* (1919), and *Colonial Self-Government* (1904). Another study, based upon a fresh examination of the sources, is *The Founding of New England* (1920), by James Truslow Adams. Here the economic and imperial relations of the colonies receive adequate attention, and the bitter struggle of the theocratic party against the advancing tide of democracy is treated critically. The place of the British Board of Trade in the imperial scheme is set forth understandingly by Oliver Morton Dickerson in *American Colonial Government, 1696–1765* (1912). Of course, it is impossible to explain the work of colonization, especially in New England, without a knowledge of the Puritan movement. "The Political Ideas of the Puritans" are discussed by Herbert L. Osgood in *Political Science Quarterly,* vol. VI. See also G. E. Ellis, *Puritan Age in Massachusetts.* Charles E. Merriam has admirably summed up the contribution of the Puritans to political theory in *A History of American Political Theories* (1920), Chap. I.

Standard histories of the colonial period should not be neglected, especially John A. Doyle's *English Colonies in America* (vols. I–III, 1889, and vols. IV–V, 1903), and John G. Palfrey's *History of New England* (2 vols. 1866). A comprehensive history of Massachusetts, divided into three periods, Colonial, Provincial and Commonwealth, is the work of John Stetson Barry. General histories of the United States may likewise be consulted with profit. George Bancroft laid stress upon the importance of original authorities, and his *History of the United States from the Discovery of the American Continent* (unabridged edition) contains some valuable source material. Professor Channing has devoted volumes I and II of his *History of the United States* to the period before the Revolution. The monumental coöperative work, the *American Nation* series, in twenty-seven volumes, edited by Albert Bushnell Hart, recognizes the importance of colonial origins by assigning the first seven volumes to the founding and development of the American colonies.

CHAPTER II

THE POLITICAL THEORY OF THE REVOLUTION

I. Origins of the Independence Movement

The War of Independence fused the united colonies into a nation. In the white heat of conflict there was forged from blood and iron a national consciousness which was to persist even through dark and critical periods, and to find embodiment in "a more perfect union." As an instrument of law the Constitution of the United States is national, as events of the Civil War proved. Fortunately the first administration of the new government was national in its outlook. To George Washington is to be given a large share of the credit for lifting American foreign policy out of a narrow colonialism to a higher and broader plane of nationalism. His administration realized objectively what the Declaration of Independence had proclaimed to the world; namely, that the people of the colonies had the right "to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them." The finishing touches to his doctrine of American nationalism were added by Washington in his Farewell Address, when he said: "Europe has a set of primary interests which to us have none or a very remote relation," owing in no small degree to "our detached and distant situation." The dissimilarity between the political systems of Europe and America lies at the foundation of President Monroe's doctrine of non-interference in American affairs.

Washington and Monroe did little more than put into words what had been going on from early colonial times. A set of divergent interests had been cropping out, due in part to "our detached and distant situation," in part to the kind of stock that had settled in British America, and also to the policy of the home government. Slowly there developed a consciousness of separatism and equality which found expression in the Declaration of Independence, the Revolutionary War, the administration of Washington, and the presidential message of Monroe. In the beginning there was no precon-

ceived design to achieve independence. Until the eve of the Revolution, indeed, the colonists were proclaiming their loyaly "to the best of sovereigns." Complete independence seems to have been by no means inevitable. The golden link of empire might have remained unbroken, as it is today in the British self-governing dominions, but for a succession of events in which British trade interests, the independent spirit of colonial assemblies, and above all the short-sighted and vacillating policy of the British government, figured prominently. This is not the place to describe those events; it will be sufficient to sketch with rapid strokes the background against which the political theories of the revolutionary period were projected.

In the opinion of John Adams, the real American Revolution was a "radical change in the principles, opinions, sentiments, and affections of the people." It was a change of mind and heart, a new way of looking at the relation between the colonies and the mother-country. But a change of mind does not constitute, of itself, a satisfactory explanation of any historical event; for back of states of mind, back of opinions, lie interests and deep-seated habits of behavior which must also be reckoned with. The fact is that very early the colonies fell into habits of doing things that gave rise to ideas and interests which eventually clashed with imperial conceptions entertained by British statesmen. The distant situation coupled with local circumstances and objective necessity, made it imperative that the colonists should take the initiative in matters of defense, internal order and security, medium of exchange, intercolonial relations, and in dealings with the French and Dutch as well as with the native tribes. Soon a vaguely defined colonial consciousness, based upon ideas and interests divergent from the imperial system (or what passed for a system), began to emerge. The conception of a separate and equal station grew by accretion, slowly and unconsciously; it developed in objective behavior, and eventually was rationalized in political theory, reaching its highest pitch in the Declaration of Independence.

As early as 1621 the people of Plymouth were obliged to assume powers and to perform functions ordinarily associated with sovereign communities. A treaty of friendship and alliance was concluded between Massasoit, a local Indian chieftain, and the government of Plymouth. The native chief, accompanied by his leading men, appeared before the governor and people of the colony and promised under oath to be a friend to the white man in peace and an ally in war. It would be an exaggeration to regard this forest compact as a treaty between two high-contracting and sovereign parties; for Plymouth was

not an independent commonwealth, not even a corporation. Moreover, Massasoit was not the king of an independent nation. However, while Indian nations, in American theory, have not been regarded as sovereign and independent, treaties with them have been held to have the same dignity and effect as treaties with independent foreign nations. But the legal point does not concern us here. The important fact to be observed is that Plymouth was obliged to regulate its external affairs in a way that corporations in England were not obliged, and would not have been permitted, to do. It is true that the colony made the king a party to the transaction, but as the colony had no charter from the king it could not legally contract in his name. What it actually did was to exercise, in the name of self-preservation, a sort of primitive, objective sovereignty.

The transfer of the charter and government of Massachusetts Bay from England to America, in 1630, gave a new turn to colonization, one that started it toward independence. John Quincy Adams credited the transfer with momentous and far-reaching consequences. Speaking before the Massachusetts Historical Society, in 1843, he said: "... by bestowing upon the colonies themselves an organization perpetually tending to independence, gradually predisposed the minds and measures of men to that final separation from the parent stock which it was impossible not to foresee must, in the lapse of ages, prove unavoidable."[1] Without believing that the transfer of the charter made independence "unavoidable," one can easily believe that it did facilitate a type of behavior which tended toward independence. The governor of the corporation now became the governor of the colony, and the planters gradually became freemen and citizens. The identification of the corporation with the colony paved the way to the future commonwealth; and one reason why Massachusetts was always regarded with suspicion by royalist elements in England was because from 1630 to 1684 it was practically self-governing.

Not many years after the treaty of Massasoit there was formed in New England a league of colonies for protection against the Indians and other unwelcome neighbors. The preamble to the articles of confederation (1643) reveals the motives which prompted the movement: "... and whereas we live encompassed with people of several nations, and strange languages, which hereafter may prove injurious to us and our posterity: and forasmuch, as the natives have formerly committed sundry insolencies and outrages upon several plantations

[1] *Collections of the Massachusetts Historical Society, Third Series,* vol. IX, p. 202.

of the English, and have of late combined against us."[2] And because the distractions in England prevented their seeking protection from that quarter, they formed an association among themselves for "mutual help and strength." Thus the absence of protection from abroad induced the four colonies of Massachusetts, Plymouth, Connecticut, and New Haven, to enter into a compact to protect themselves. The result was an instrument of public law. It embodied an organ of control charged with matters of war and peace, relations with neighboring peoples, and division of the spoils of war. Enemies of New England represented the confederation as a war-combination formed without permission from England, to throw off the yoke of dependence. This the colonists stoutly denied, and justified their action on the ground of necessity and self-preservation. Edward Winslow, who was sent across the water to defend the confederation, said: "If we in America should forbear to unite for offense and defense against a common enemy (keeping our governments still distinct as we do) till we have leave from England, our throats might be all cut before the messenger would be half seas through."[3] But it is not at all surprising that the authorities in England looked askance at this voluntary confederation of four colonies formed without the consent of the home government. Allegiance and protection are intimately connected. In return for imperial protection the colonies might in reason be asked to render imperial allegiance; but once they had mutually combined to protect themselves their allegiance to the Empire might be at an end.

As a result of their having been left alone during the civil wars and owing to their sympathy with the parliamentary party, the people of New England, especially Massachusetts, were loath to accept the new régime at the Restoration. Commissioners sent over by Charles II for the purpose of inquiring into complaints and, in general, of drawing the colonies closer to the crown, were accorded a cool reception in Massachusetts. There those staunch dissenters stood solidly upon their rights, natural and chartered, and refused to coöperate with the commissioners or even to entertain their proposals. They issued a declaration pointing out that they had founded their colony at their own expense, had purchased the land from the Indians, by great labor had brought things to their present condition, and for

[2] William MacDonald, *Select Charters and Other Documents Illustrative of American History, 1606–1775* (1914), p. 95.

[3] Quoted by Frothingham in *The Rise of the Republic of the United States* (1899), p. 47.

more than thirty years had "enjoyed the privilege of government within themselves, as their undoubted right in the sight of God and man. To be governed by rulers of our own choosing and laws of our own, is the fundamental privilege of our patent."[4] They denounced the arbitrary, discretionary power of the commissioners to receive and determine complaints and appeals. Charles II was displeased, and in writing to the people of Plymouth a letter commending them for their good reception of his commissioners he referred to the "refractoriness" of Massachusetts. In the opinion of a close observer, the governor of Massachusetts from 1771 to 1774, the colony of Massachusetts Bay had gone far toward independence before the Restoration. "From 1640 to 1660 they approached very near to an independent commonwealth; and during this period completed a system of laws and government. . . . In this they departed from their charter; and instead of making the laws of England the groundwork of their code, they preferred the laws of Moses; and notwithstanding the charter knew no representative body, they established one; and although it gave them no power to judge and determine capital offenses they gave this power to the judicatories they erected."[5]

The fact that some sort of colonial union was necessary for general defense and safety, in view of the encroachments of the French and their Indian allies, had become so evident by 1754 that even the Lords of Trade, who feared union because of its imperial repercussions, authorized the colonial governors to initiate and further such a project. This authorization resulted in the Albany Congress, which drew up a plan of proposed union of the several colonies. A central government was contemplated, constructed on the principle of a compromise between royal prerogative and the loose-jointed New England Confederation. Colonial interests were to be cared for by a Grand Council, composed of representatives from the several colonies, chosen in their respective lower houses of legislation, in number proportionate to size and wealth. The royal prerogative was to be guarded by a President-General, appointed and paid by the crown, and having a veto on the acts of the Grand Council. Together they were to be empowered to regulate Indian affairs, assume temporary control of new settlements, raise and equip armies, build fortifications, equip vessels for the protection of colonial trade, and make laws and levy taxes,

[4] George Bancroft, *History of the United States* (9 vols. 23d edition), vol. II, p. 80.

[5] Thomas Hutchinson, *The History of the Province of Massachusetts Bay* (3 vols., 1764–1828), vol. II, p. 3.

provided no law was repugnant to the laws of England. But the time was not yet ripe for union. The colonists looked askance at the independent power of the President-General, and also at the idea of granting to a central body the power of taxation; so they rejected the plan. The home government liked it no better. It seemed to savor too much of self-government. Franklin, who participated actively in the Albany Congress, summed up the results, in brief compass, as follows: "The crown disapproved it, as having too much weight in the democratic part of the constitution, and every assembly as having allowed too much to prerogative; so it was totally rejected." [6]

As the feeling of separatism and equality increased during the second half of the eighteenth century, it became necessary, on account of the fact that the established order was, for the most part, under the control of the crown, to devise means whereby intercolonial feeling might be promoted, unified, and consolidated, and, if necessary, translated into action. In response to that necessity there sprang up a crop of extra-legal devices for promoting intercolonial intelligence and understanding, and even for enforcing regulations unknown to the law. Committees of correspondence were appointed by groups of merchants, by towns, and finally by colonial assemblies. "Sons of Liberty" were organized which called royal officials on the carpet and enforced non-importation agreements. A second system of government was set up by the side of the established order. When assemblies were dissolved by royal governors, conventions took their place. By officials of the crown this entire florescence of voluntary, extra-legal control was regarded as conspiracy against rightful authority. Hutchinson viewed the committees of correspondence as a "confederacy formed for maintaining this independence"; and he would date the revolt of the colonies from the organization of these committees rather than from the Declaration of Independence. The whole movement stood out in his mind as "a design to usurp a new, unconstitutional, and independent authority." [7] A new power was in the making beyond that of the established government.

Thus there grew up in the colonies a new set of political, economic, and social ideas ascribable in large part to the kind of human stock which had settled in the New World, but also to the time of settlement, to the distance from the mother-country, to local circumstances, and to the attitude of the British government. A new set of interests divergent from those of British merchants developed with the passing

[6] Frothingham, *op. cit.*, p. 149, note.
[7] Hutchinson, *op. cit.*, vol. III, pp. 173, 223.

of time; and as a result new habits of action were formed. The colonists behaved at times as if they were quite independent. Colonial ideas, interests, and habits found embodiment in political and legal institutions unlike, in some respects, those of the mother-country. Most of the colonists were Englishmen, and gloried in the fact; but they were of a different mold and temper from Englishmen of the British Isles. They had other ideas on trade, manufacturing, representation, and the nature of the Empire. A part of the stock of colonial ideas was feudal; another part was ultra-modern; but none of it was precisely identical with the ideas held by the leaders of the British government. Some sort of compromise was necessary to save the Empire. British ministries conceded all they thought they could concede, by reducing the duty on molasses, repealing the Stamp Act, and modifying the Townshend Act; and meanwhile they requested the colonies to devise a more acceptable mode of taxation. But on the principal point, parliamentary supremacy, they would not yield. Gradually colonial opinion had reached a state where parliamentary supremacy in any form was so obnoxious as to be intolerable. There was no way out of this impasse short of retreat on the one side or the other, or else aggression such as to bring on war. It was in the nature of aggressions that the colonists interpreted the Boston Port Act, the suspension of the legislature of New York, the quartering of troops, and the Quebec Act. The hour of the American Revolution had struck.

II. Natural Rights

The Founding Fathers were both legally and philosophically minded. Not a few of them were trained in the law—such men as James Otis, John Adams, Thomas Jefferson, James Wilson, and Patrick Henry. The constitutional argument against parliamentary supremacy was drawn up with remarkable skill and acumen; but it could be variously construed according to individual notions concerning the nature of the Empire. The lawyers of the crown put forth one interpretation, whereas the lawyers of the colonies put forth another and diametrically opposed interpretation. If the Empire was a unitary state, then the colonists were bound by acts of Parliament; if, on the other hand, it was a sort of "imperial partnership" based upon continuing consent, then the colonists were not bound except by their own local assemblies. There seemed no way out of this impasse short of an appeal to a political philosophy wherein the rights of the colonies might find justification as even more fundamental than the acts of

Parliament. Might there not be found a law and a set of rights anterior and superior to positive enactments of the British Parliament? Might there not be found, back of charters and instructions of governors, even back of legislative acts, a higher authority from which civil rights derived their validity? Such a political philosophy would serve the cause effectively. Accordingly both lawyers and laymen delved deeply into the philosophy of rights. Samuel Adams, a layman, was no less forward and facile in constructing a bulwark of natural rights than was his relative, John Adams, a capable and rising young lawyer. In 1774 the opposition rested its case on a threefold argument drawn from (1) the immutable laws of nature, (2) the English Constitution, and (3) charters. In this argument the law of nature was granted first place as most important. By 1776 the philosophical concept of natural law and natural rights held the field almost by itself, the Declaration of Independence being little more than an elaboration of this.

Back of the legal order—so the theory of the *Naturrecht* school ran—anterior and superior to it, are to be found certain primordial rights, variously defined as natural, sacred, primary, original, inherent, inalienable, indefeasible, essential, and absolute. They possess a validity independent of all positive laws and forms of government. They are rights that cannot be restrained or repealed by human law. Derived from a higher source than positive laws, they represent an area of immunity upon which governments cannot encroach. They represent "unceded portions of right" reserved from the power of government, an absolute quantum of rights laid away in a sort of safe-deposit for all time. "Our ancestors," wrote James Wilson, "were never inconsiderate enough to trust those rights, which God and Nature had given them, unreservedly into the hands of their prince."[8] They are not to be sought in statute books or charters; they are a part of the moral constitution of the universe. No one has described this body of original and inalienable rights more strikingly than Alexander Hamilton, in a frequently quoted passage of grandiose style befitting the subject: "The sacred rights of mankind are not to be rummaged for among old parchments or musty records. They are written as with a sunbeam in the whole volume of human nature, by the hand of the Divinity itself, and can never be erased or obscured by mortal power."[9] Sacred, absolute, and beyond the reach of meddle-

[8] Frank Moore, *American Eloquence*, vol. I, p. 72.

[9] *The Works of Alexander Hamilton*, edited by John C. Hamilton (7 vols. 1851), vol. II, p. 80.

some legislatures, they can never be taken or contracted away; they remain a permanent heritage in the midst of changing forms of government and human vicissitudes.

The terms used to describe natural rights suggest the sources from which they were thought to have been derived. As "sacred," they were the gift of a supernatural being, the Creator of the universe, the King of kings, the Legislator of the world. As "original" and "inherent," they were supposed to have inhered in human nature from the beginning—the product of reason. As "absolute," they were regarded as having emanated from the law of nature, which is everywhere and always the same, and cannot be voided by acts of Parliament. As "indefeasible" and "inalienable," they were looked upon as rights which had stood the test of time, and had come through still valid; that is to say, they had descended from a long line of precedent and custom. In fact, the colonists were not always careful to distinguish between rights purely natural and rights established by custom and precedent. They even went so far, following the lead of Blackstone, as to identify the English constitution and natural rights. "The rights of nature are happily interwoven in the British Constitution. It is its glory that it is copied from nature."[10] The acute legal mind of John Adams phrased the same idea in more formal language. "English liberties," he wrote, "are but certain rights of nature, reserved to the citizen by the English constitution, which rights cleaved to our ancestors when they crossed the Atlantic . . ."[11] To find the sources of these natural rights, then, it is necessary to go back to religion, human nature, and the common law of England. Insofar as they were not customary rights of long standing, they were metaphysical deductions from religious thought and the psychology of human nature.

Just what content the Founding Fathers wished to give to the concept of natural rights, it is difficult to determine on account of individual variations and the demands of time and place. Much depended upon what issue was at stake. If it were a question of expatriation, there was no difficulty in finding for that right a place among the inalienable rights of nature. If it were a question of representation, freedom of trade, or freedom of religion, there was no less difficulty in finding these rights embedded in the law of nature. It was generally agreed that life, liberty, property, and the pursuit

[10] *The Writings of Samuel Adams*, edited by Harry Alfonzo Cushing (4 vols. 1904–8), vol. I, p. 47.

[11] *The Works of John Adams*, vol. IV, p. 124.

of happiness were outstanding, primordial rights which were anterior and superior to positive law. According to James Wilson, property, character, liberty, and safety comprised the body of natural rights. When the General Court of Massachusetts felt aggrieved that their sittings should be removed to Cambridge by instructions addressed to the governor, they branded instructions to royal governors as contrary to nature. Peace and good order were regarded as natural rights. The right of self-government, including the right to vote, was included in the list. The procedural rights of trial by jury and *habeas corpus* are obviously derived from the English Constitution; but since the English Constitution and the rights of nature were closely identified in the thought of the times, it was easy to view even these rights as "inherent." The natural rights of Englishmen easily slipped into the natural rights of man. Above and beyond everything was the primordial right of self-preservation, and its corollary, the right of revolution. The Declaration of Independence proclaimed the doctrine that it was the duty of the people to throw off governments that had become despotic, to alter or abolish old governments and to institute new ones in their place. The safety of the people was to be the supreme law.

To inquire whence the men of the Revolution derived their conception of natural rights is to raise a historical question which cannot be answered without ascending the line of political thinkers certainly as far back as Aristotle. When Jefferson was questioned concerning the sources of the ideas contained in the Declaration of Independence, he linked the names of Aristotle, Cicero, Locke, and Sidney. Thus there were ancient sources of the conception, and there were also modern sources. The doctrines of natural equality and natural freedom, as also of natural law as a body of immutable principles, are surely as old as Roman Law, derived from Stoic philosophy. The Romans were familiar with the theory of the consent of the governed.[12] The proximate sources, on the other hand, were the civil wars of England, the Commonwealth, and the Glorious Revolution, all of which levied on the old traditions of English liberty and called forth liberal and even radical ideas. Harrington, Milton, Sidney, and Locke, and, farther back, Hooker, Grotius, Pufendorf, and Vattel, were known to the men of the Revolution. Moreover, they were familiar with the great depositaries of English liberty, *Magna Charta,* Petition of Right, *Habeas Corpus* Act, and Bill of Rights. The *jus naturale* and the *jus gentium* of Roman Law influenced American

[12] See *lex regia. Institutes of Justinian,* I. 2. 6.

writers through publicists on international law, particularly Vattel. Blackstone, whose *Commentaries* were known to every lawyer in the American colonies, was thoroughly familiar with the law of nature and the law of nations. The principal source of the political theory of the men of the Revolution was John Locke's *Two Treatises of Government*. The men of Massachusetts, in their controversy with their governor, cited time and again "the great Mr. Locke," whose word to them was final. Resolutions, bills of rights, and the Declaration of Independence breathe the spirit of the Glorious Revolution which was caught and expressed so well in the *Two Treatises of Government*. Locke, in turn, was indebted to Hooker, and also to the Levellers. The latter had returned to the concept of a state of nature and natural rights, to the law of God and of reason, and to the common law of England, for a justification of their radicalism. They appealed to Sir Edward Coke in defense of the idea that a law of Parliament repugnant to common law was void. Locke said in 1690 what the Levellers had said in 1646.[13] Thus the doctrine of natural rights was the ripe fruit of a tree whose roots struck deep into the soil of Stoic philosophy as crystallized in Roman Law, of the political philosophy of Aristotle, as conveyed to the modern world through Aquinas and Hooker, and of the general enlightenment of the eighteenth century, in part a product of the Protestant Reformation of the sixteenth century. French revolutionary philosophy was a later phenomenon. Jean Jacques Rousseau seems not to have influenced to any great extent the Fathers of the American Revolution during the formative period of their political thinking.[14] French influence on American political theorists is discernible, but the American Revolution was not a product of that influence.

The men of the Revolution turned the doctrine of natural rights to good account in defending their position. They used it in developing their theory of empire, that is, an "imperial partnership" based upon mutual consent. A comprehensive (though not an original) statement of it is to be found in Jefferson's *Summary View* (1774). The American colonies would form a self-governing dominion in an empire held together by a common allegiance to the king. Jefferson built his imperial construction on the natural rights of expatriation, property, representation, and consent of the governed. It was but an elaboration of the theory of self-government, which was regarded as a natural

[13] Theodore Calvin Pease, *The Leveller Movement* (1916), p. 364.

[14] See Charles E. Merriam, *A History of American Political Theories* (1920), pp. 91–92.

right. Their empire, therefore, would rest upon the pillars of natural law, and rise into the rarefied atmosphere of natural liberty and equality. The Fathers used natural rights also as a principle of fundamental law by which royal prerogative and acts of Parliament might be limited and even annulled; that is to say, they made of natural rights a set of legal limitations. Instructions to royal governors were put down by the men of Massachusetts as unconstitutional, according to the immutable laws of nature. A law of Parliament taxing the colonies without their consent was to be regarded as repugnant to the law of God and of Nature. They elevated natural law and natural rights into a constitutional principle by which to test and evaluate acts of king and parliament, and to pass judgment upon them. It made the colonies the final interpreters, not only of acts of Parliament, but also of the content of the British Constitution. Thus they evolved a system of purely subjective rights highly serviceable to the cause of responsible government and of independence. The right of revolution, in which the whole political philosophy of the period under review culminated, was regarded as a natural right. According to the Declaration of Independence, it was the duty of oppressed people to alter or abolish old governments and to institute new ones in their place. Thus for their theory of empire, of fundamental law, and of revolution the Fathers were indebted to the ancient philosophy of natural rights.

III. Civil Society

Part and parcel of the philosophy of natural rights was a sharp sundering between a state of nature, with its natural liberty, and a state of civil society, with its civil liberty. Individuals might differ as to the character of the state of nature, whether it was a state of war or of peace, whether or not laws of nature were binding, but there was general agreement that such a condition preceded the state of civil society. Government was not original; it was a derived product, more or less artificial. Whether the state of nature was to be regarded as a historical fact or only as a logical concept, useful in explaining political authority, there was no general agreement. John Locke seems to have favored the idea of a historical state of nature and contract, while Hobbes and Rousseau apparently regarded these rather as a logical way of explaining the fact of political obedience. American conditions made John Locke's view more natural and acceptable. Absence of positive law, in some instances, made it necessary for col-

onists to resort to primitive methods, such as the social compact of the passengers of the Mayflower, which John Quincy Adams regarded as having been made in a state of nature. Indian titles to land were extinguished by purchase, principally on the ground that the Indians had a natural right to the soil. Some there were, interested in colonization, who felt themselves at liberty, in the absence of permission from the crown, to establish in America whatever forms of government they pleased "as fully to all intents and purposes as if they had been in a state of nature and were making their first entrance into civil society."[15] The Constitution of Massachusetts (1780) purports to be "an original, explicit and solemn compact with each other," a modern social contract.

Freedom, equality, and independence were thought to characterize the state of nature. But there were inconveniences and uncertainties incident to the ideal, pre-civil state. A standing rule of action, established and recognized, was lacking; neither was there to be found a common and impartial judge; nor an adequate power to support a régime of law.[16] These inconveniences, together with the fear of danger, prompted men to leave the state of nature and form a civil society by means of a compact. By mutual agreement they gave up to the community their natural equality, liberty, and the power of executing law each for himself, in return for civil protection of life, liberty, and property, which was to be guaranteed by fixed and known laws, by impartial judges, and by the organized force of the community. According to the orthodox view of Locke, this delegation of power by compact involved a certain sacrifice of natural liberty. Civil society represents, then, a certain abridgment of natural rights or powers. This was the prevalent theory among the men of the Revolution. Samuel Adams expressed the current theory as follows: "The natural liberty of men by entering into society is abridged or restrained so far only as is necessary for the great end of society, the best good of the whole."[17] It found lodgement in the Constitution of New Hampshire (1784) in the following form: "When men enter into a state of society, they surrender up some of their natural rights to that society, in order to secure the protection of others." But there were some who held, with the Physiocrats, that society, far from restricting the natural rights of its members, really enlarges their sphere and assures their enjoyment. Jefferson took his stand with the

[15] Hutchinson, *op. cit.*, vol. I, p. 42.
[16] See John Locke, *Two Treatises of Government* (1698), p. 262.
[17] *The Writings of Samuel Adams*, vol. II, p. 353.

Physiocrats, and denied categorically that civil society involved a sacrifice of natural rights. ". . . the idea is quite unfounded," he declared, "that on entering into society we give up any natural right." [18] He thought, further, that there was no natural right to commit aggression; that there was a natural duty to contribute to the maintenance of society; and that there was no natural right to judge one's own case. The Declaration of Independence reflects this theory: government is instituted for the purpose of securing the natural and inalienable rights of life, liberty, and the pursuit of happiness. James Wilson entered upon a calculus of the loss and gain involved in the transition from natural to civil society, for the purpose of showing that the sum total represented a gain. "Upon the whole, therefore, man's natural liberty, instead of being abridged, may be increased and secured in a government which is good and wise." [19] Civil society is thus an enlargement of the scope and a sure guarantee of primitive natural society.

For practical reasons the Fathers of the Revolution were more interested in the idea of a governmental contract than in the original social contract by which the society was supposed to have been founded. General political theory marks three steps in the formation of civil society: (1) a social compact in which each covenants with all, (2) an ordinance drawing up a plan of government, and (3) a contract between the government and the people. Whether Locke makes a place for a second governmental contract is a moot question. But the contract theory was practically useful to those in British America who wished to challenge either the royal prerogative or the supremacy of Parliament, or both. Charters were regarded as compacts between the crown and the colonists. The charter granted by Charles II to William Penn is referred to by Joseph Galloway as "the *old contract* between the crown and our first proprietor." The men of Massachusetts considered the charter of incorporation from the king a "mutual compact." The rights and obligations of the imperial relationship were viewed as reciprocal, the colonists promising the king homage and allegiance in return for protection and good administration. Failure on the part of the king to afford protection would break the compact and absolve the colonists from allegiance. This is what Jefferson seems to have had in mind when he wrote in

[18] *The Writings of Thomas Jefferson*, edited by Paul Leicester Ford (10 vols. 1892–1899), vol. X, p. 32.

[19] *The Works of James Wilson*, edited by James DeWitt Andrews (2 vols., 1896), vol. II, p. 300.

the Declaration of Independence: "He has abdicated government here, by declaring us out of his protection, and waging war against us." It is reminiscent of the vote of the House of Commons declaring James II to have abdicated and charging him with having subverted the English Constitution "by breaking the original contract between king and people." Thus the imperial relation was looked upon as being, not organic, but contractual. It was a thing of mutual consent, and could be expected to remain intact only so long as both parties lived up to the terms of the agreement.

Civil society founded upon contract is naturally artificial. It is not a part of the original constitution of things, but a sort of after-thought, rendered necessary by the imperfections of the state of nature; and by so much as the state curtails the freedom of nature, it may be regarded as a necessary evil. The protest of the Revolution was directed against the personal and arbitrary government of George III. Protesting against arbitrary government, the colonists could easily slip into protests against strong government in general. Even government itself is suspect in the writings of the period—an attitude which crops out most clearly in Thomas Paine's well-known aphorism: "Society is produced by our wants, and government by our wickedness." That government was thought to be best which governed least. The principal functions of organized political society were held to be the protection of the citizen's inalienable rights and the promotion of the public good. Liberty was to be found in weak government. There existed a great personal sphere of immunity from governmental encroachment. In brief, the political philosophy of the Revolution was highly individualistic. It knew nothing of an organic state; and one may question if it had any theory of the state at all. Paine emphasized the place of spontaneous society, apart from government, in the social economy. Many writers located sovereignty in the people. Thus the theory of the time took account of society, of the people, and of government; but it found no place for the strictly jural and organic concept of the state, of which later generations have made so much.[20]

IV. Responsible Government

Political liberty was bound up in the theory of the Revolution with responsible government. The essence of Locke's political philosophy

[20] Charles E. Merriam, *History of the Theory of Sovereignty since Rousseau* (1900), p. 90. Cf. also Randolph G. Adams, *Political Ideas of the American Revolution* (1922), p. 175.

was the responsibility of the ruler to the ruled, and it was this doctrine which the men of the Revolution applied to Parliament and to the king. The House of Representatives of Massachusetts insisted that the king was limited in the use of his prerogative, and quoted "the great Mr. Locke." The doctrine of the Levellers that Parliament was not unlimited became part of colonial thinking. As a result of their experiences the Fathers were suspicious of power; they wished to delimit its sphere, to enumerate its rights and obligations, and to check its operation. They would enlarge as much as possible the bounds of individual liberty; and at the same time they would contract and circumscribe as much as possible the bounds of governmental authority.

As one means of achieving political responsibility, revolutionary political theory made much of the sovereignty of the people. In contrast with the supremacy of Parliament, taught by Blackstone and the crown lawyers, we find that the colonists laid stress upon the sovereignty of the nation. The Declaration of Independence was proclaimed "in the name and by the authority of the good people of these colonies." State constitutions, framed during the revolutionary period, vested political authority in the people. The Declaration of Rights of the Constitution of Virginia (1776) directly links popular sovereignty and responsible government, proclaiming: "That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them." The Constitution of Massachusetts (1780) declared that magistrates and officers of government were "substitutes and agents" of the people, and "at all times accountable to them." Even before the Revolution the General Court of Massachusetts was bold in declaring its right to call governors and officers to account. Among the liberties of freemen in Massachusetts was numbered the right "to choose all magistrates, and to call them to account at their general courts."[21] Unable to make laws and execute them directly, the people were obliged to have recourse to representatives; but they made it abundantly clear that their representatives were only their agents, and as such were to be kept responsive to public opinion by frequent elections and short terms of office. So far was the accountability of representatives carried that the Articles of Confederation reserved to each state the power "to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the re-

[21] Hutchinson, *op. cit.*, vol. I, p. 495.

mainder of the year." And while protecting themselves against their representatives, the people also protected their representatives against personal and arbitrary government, such as executive suspension of laws. Laws were not to be suspended "without consent of the representatives of the people." [22] Even the exercise of the royal prerogative, if abusive, could be withstood by the representatives of the people.[23]

Perhaps the most effective means of insuring responsible government, both before and after the break with the mother-country, was through control of the purse by the elected representatives of the people. The principle that taxes should be levied with the consent of those upon whom the burden falls, is as old as *Magna Charta*. The colonists were willing enough to grant aids to the crown on requisition, as they were also willing to make annual grants to their respective governors and judges; but they could not bring themselves to tolerate a civil list, created by taxation, from which governors and judges might be paid, for that meant depriving the people of their great lever of power, namely, the control of the purse. One of their grievances proclaimed to the world in the Declaration of Independence was that George III had made "judges depend upon his will alone for the tenure of their offices and the amount and payment of their salaries." Before the bar of the House of Commons, in 1766, Benjamin Franklin explained that the colonies were willing to grant aid to the crown according to old usage. "The granting of aids to the crown," he said, "is the only means they have of recommending themselves to their sovereign"; and to have the system of grants in aid replaced by a system of parliamentary taxation would "deprive them of a right they esteem of the utmost value and importance, as it is the security of all their other rights." [24] It was the belief of the colonists that the crown, as well as the governors and judges, would be more tractable and amenable to reason if they were always conscious of their dependence on the colonies for their means of subsistence. The granting of aids to the crown established a sort of reciprocal obligation, an implied contract based upon mutual rights and duties. If the crown protected the colonies, they in turn would render the service of allegiance, which carried with it the granting of supplies. But the implied contract was conditional; for if the crown failed in its duties, the colonies might refuse to grant aid. It was a club behind the door. Un-

[22] *Virginia Bill of Rights* (1776).

[23] Hutchinson, *op. cit.*, vol. III, p. 302.

[24] *The Works of Benjamin Franklin*, edited by James Sparks (10 vols. 1840), vol. IV, p. 180.

just judges and arbitrary governors might be starved out under such a system. But if the power of Parliament to levy taxes were once conceded, a civil list might be created which would render magistrates and public officers independent of colonial assemblies; hence, the resolute opposition to parliamentary taxation. In the end it all simmered down to the question of responsible government, debated in terms of tenure of office and salaries. So deeply embedded in colonial consciousness was this principle of the English Constitution, namely, control of the purse by those who paid, that it found its way into state revolutionary constitutions, and eventually was carried over into the United States Constitution, where it found expression in the provision that all bills for raising revenue should originate in the House of Representatives.

If everything else failed, the colonists might fall back upon the natural rights principle of consent, institutionalized in English history. By the law of nature it was established that property could not be taken without the consent of the possessor. According to *Magna Charta,* the Petition of Right, and the Declaration of Rights, as interpreted by the colonists, English subjects were not to be taxed save by their common consent. The Petition of Right (1628) prayed that no one should be compelled to pay a tax "without common consent by Act of Parliament." The American view, as explained by Franklin before the bar of the House of Commons, was that so long as British America had no representatives in Parliament it could not be counted in as making part of the "common consent." Consequently taxes levied by a Parliament in which America had no representatives were unconstitutional. The British government, on the other hand, contended that the colonists were virtually represented in Parliament, and had constructively given their consent. Franklin favored American representation, but public opinion in the colonies was against it, on account of the distance and consequent probable ineffectiveness. The net result was the demand that colonial assemblies should possess the exclusive right of taxation. Thus by way of the natural and customary right of consent the colonists returned once again to the old starting-point, namely, the privilege of responsible self-government.

Finally, the colonial theory of empire dovetailed beautifully into the colonial scheme of responsible government. John Adams, Thomas Jefferson, Alexander Hamilton, and others wished to see evolved an empire responsible in all its parts. Their thought concerning imperial relations was distinctly federalistic and corporative. Hamilton could conceive no good reason why a state might not be "a number of in-

dividual societies or bodies united under one common head," each with its own legislature, such as the legislatures of Great Britain, of Ireland, or of New York. Legislative competence might be so delimited that the Parliament of Great Britain would have the right to pass general acts by way of amending common law and for the regulation of trade, reserving to each dominion the right to levy its own taxes and enact its own special laws. Such an empire would exemplify a decentralization of legislative power, while retaining a centralization of executive power. The sovereign would be "the central link connecting the several parts of the empire." Jefferson challenged the right of Parliament to suspend the legislature of New York, on the ground that it was a case of one free and independent legislature suspending another, equally free and independent. In his imperial theory all the dominions were "states of the British Empire," constituting a sort of advance British commonwealth of nations; consequently the claim by Parliament of the right to legislate for the whole Empire was arrogant and unjust. Conversely, the theory of a unitary state, with a sort of omni-competence attaching to Parliament, the men of the Revolution rejected *in toto* and withstood to the end. To have conceded that point would have been to surrender their case, and with it the demand for responsible government; for, according to colonial theory, a unitary state, with its legislative center at Westminster, would have been irresponsible. The practical conclusion of this line of reasoning was always the same: a flat denial of the right of any political authority except colonial assemblies to levy taxes on property. Thus once again it appears that the Fathers regarded the control of their property as the key to just, responsive, and responsible government.

Another form which the demand for responsible government took was the insistence that civil should always be superior to military authority. Because of the use made of standing armies by the British government to further its imperial designs, to which the colonists were unalterably opposed, public opinion in the colonies crystallized against standing armies. British troops in America, kept there ostensibly to protect the colonies against a return of the French, were regarded by the colonists as a sort of imperial police charged with seeing to it that the acts of Parliament were obeyed. According to the colonists' theory of empire, these troops were "foreign," having been sent without the knowledge and permission of colonial assemblies. They were invaders. The Virginia Bill of Rights sanctioned a well-regulated militia; but it inveighed against standing armies in times of peace, and provided ". . . that in all cases the military should be under

strict subordination to, and governed by, the civil power.'' The Declaration of Independence charged George III with having kept armies in the colonies in times of peace without the consent of their legislatures, and with having attempted to render the military power independent of and superior to the civil power. The colonists felt that the military arm was an integral part of the British scheme of irresponsible government. It represented to them superimposed authority, not amenable to the will of the people. It was a survival of a military age when the will of the chief was law. It stood for a reign of force. Natural rights and fundamental laws would evaporate in the presence of bayonets and cannon, and even revolution in such a situation might terminate unsuccessfully. Hence it is not surprising that the Fathers were suspicious of military power and wished to subordinate it to civil power. Their whole theory of empire was involved in the matter, and with it their theory of responsible government.

V. Supremacy of Law

To have recourse to revolution in defense of law seems paradoxical in the extreme. Revolution is an overturning of the established order; it is extra-legal in character, and from the standpoint of the established sovereign it is illegal. But, curiously enough, American revolutionary theory was imbued with reverence for law and a desire for its supremacy. There was no revolt against English institutions *per se.* The English Constitution was held in high esteem by the colonists, at least until the eve of the Revolution; and even then appeal was made to indubitable rights of Englishmen, such as taxation by consent, trial by jury, and ''the free system of English laws in a neighboring province.'' Not a little of the Declaration of Independence is taken up with grievances against the King for his interference with the régime of law in the colonies. ''He has refused his assent to laws, the most wholesome and necessary for the public good.'' ''He has forbidden his governors to pass laws of immediate and pressing importance. . . .'' ''He has refused to pass other laws for the accommodation of large districts of people. . . .'' ''He has called together legislative bodies at places unusual. . . .'' ''He has obstructed the administration of justice. . . .'' ''He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws.'' Complaint is made against him for establishing arbitrary government in Quebec, ''for taking away our charters, abolishing our most valuable laws, and altering, fundamentally, the forms of our govern-

ment.'' In brief, much of the Declaration of Independence is in defense of the nascent American Constitution, its charters, laws, and forms of government. The Revolution was against one form of government, and for another; it was certainly not against law and government in general. In a larger sense it was a revolution for the establishment of the supremacy of law. The colonists were fighting the battles of liberalism and constitutionalism both in England and in British America.

Repelled by the doctrine of parliamentary supremacy, the colonists refused to recognize the sovereignty of any organ of government. According to revolutionary theory, the will of the king was bound by law. The doctrine of the ''divine right'' of parliaments, together with the ''divine right'' of kings, was relegated to the scrap-heap of false and pernicious teachings. In the contest between the supremacy of government and the supremacy of law, the colonists did not hesitate to take sides. The rights of the king, they held, were limited by law. ''This prerogative [of the king] our law pronounces to be solely governed by the laws of the land: those being the measure as well of the king's power, as the subject's obedience.'' [25] John Adams was bold in his assertion that ''an English king had no right to be absolute over Englishmen out of the realm, any more than in it.'' [26] Thomas Paine would recognize no prerogatives save those which belonged to the sovereignty of the people themselves. The only sovereignty recognized by revolutionary theory is the sovereignty of the people and the sovereignty of law. The goal of the Fathers was an impersonal justice free from the bias of individual will. It was nothing short of the ''empire of laws'' so highly prized by Harrington. Perhaps the clearest expression of their political ideal is to be found in the Constitution of Massachusetts (1780), drawn up largely by John Adams, a disciple of Harrington, wherein the government of the commonwealth was designed to be ''a government of laws and not of men.'' The whole history of reaction against personal and arbitrary rule, as it took place in England during the seventeenth century, and on the American continent during the eighteenth century, may be summed up in a few words. Governments of men, where the vagaries of the human will had warped and perverted justice, had proved hopelessly unsatisfactory; and no recourse was left save to lift sovereignty out of the realm of will and identify it with law. In a sense this was a reversion to the

[25] *Instructions from the Town of Boston to their Representatives, May 15, 1770,* reprinted by Hutchinson, *op. cit.*, vol. III, p. 511.

[26] *The Works of John Adams,* vol. IV, p. 126.

principle of feudal times when the will of the king was bound by law, as Bracton taught. The Levellers revived it; Locke emphasized it; and the men of the American Revolution caught and crystallized it in political theory. They returned to the spirit of the earlier English constitution, wherein the state was regarded as organic, the king being only its servant, and law being its very life.[27]

This recrudescence of the feudal principle of the supremacy of law found expression in America in the principle of constitutionality. Some laws were held to possess a superior validity. They were regarded as more fundamental; whether on account of conformity to the law of nature, or of right reason, or of the will of God, or of long established custom, mattered little. It was upon the grounds of unconstitutionality that Franklin protested to Governor Shirley against a proposed parliamentary tax in 1754; that royal instructions to governors were resented; that writs of assistance were declared illegal; that the Stamp Act was denounced; that the legislative power of a council appointed by the crown during pleasure was made a grievance; that the tax on tea was not paid; that the act of Parliament suspending the legislature of New York was condemned; and that many other acts of the home government were resented, protested, and disobeyed. A rudimentary British-American constitution began to evolve, based upon charters, rights of man, the English Constitution, and immemorial custom. The council of Massachusetts informed the governor, in 1770, that the charter was "the great law of the constitution, and is the foundation of all the laws in the province."[28] As originally it was through the medium of *Magna Charta* that the principle of fundamental law was transmitted from feudal to modern times, it was but natural that all who wished to invoke this principle should appeal to that source.[29] It crops out in the Petition of Right in the assertion that laws and statutes of the realm are superior to the royal prerogative. The Agreement of the People is based upon an authority anterior and superior to all governments. The Instrument of Government was designed to serve as a written constitution, limiting governmental authority. The Declaration of Rights and the *Habeas Corpus* Act breathe the same spirit of the supremacy of law. The immediate source of the idea in the colonies was Locke's *Two Treatises*

[27] See Charles H. McIlwain, *The High Court of Parliament and its Supremacy* (1910), p. 75.

[28] Hutchinson, *op. cit.*, vol. III, p. 520.

[29] McIlwain, *op. cit.*, p. 55, quoting George B. Adams in *American Historical Review*, vol. XIII, p. 237.

of Government, wherein is revived much of what the Levellers taught. The House of Representatives in Massachusetts, in its war of words against royal prerogative, quoted "the great Mr. Locke" to the effect that there was "a law antecedent and paramount to all positive laws of men."[30] From Grotius, Pufendorf, and especially Vattel, the colonists derived the same idea. It was in the air; it was a part of their mental equipment; and when they took up arms it was to establish the superiority of the civil over the military power, the superiority of responsible over irresponsible government, and the supremacy of law over the supremacy of government.

Besides narrowing the bounds of royal prerogative and legislative competence by means of fundamental law and natural rights, the men of the Revolution sought to establish a régime of law by means of governmental organization. They would divide and separate powers, and so balance them, one against the other, that sovereignty should not be in government at all, but in law. It is so customary to associate the doctrine of the separation of powers with the framing of the Federal Constitution that a certain wrench of the mind is required to place it back in revolutionary theory; but in fact that is where it began to take definite shape. In 1776, after the repeal of the Stamp Act, the House of Representatives of Massachusetts was emboldened, when electing members of the council, to pass by the lieutenant-governor, the secretary, attorney-general, and one of the judges of the superior court. So unusual was this proceeding that it called forth the governor's veto in regard to the elected councillors. In the ensuing discussions the House of Representatives took the position that its action was predicated on the danger of a union of executive and legislative powers in the same hands. In 1774 the Continental Congress branded as "unconstitutional, dangerous, and destructive to the freedom of American legislation" the exercise of legislative power by a council appointed by the crown during pleasure. "It is indispensably necessary to good government, and rendered essential by the English constitution, that the constituent branches of the legislature be independent of each other." The Virginia Bill of Rights (1776) contains a declaration against a union of legislative and executive powers, on the one hand, and the judiciary, on the other. The clearest and most philosophical statement of the relation of the separation of powers to the supremacy of law is to be found in the Constitution of Massachusetts (1780), where each set of powers is placed in its own bracket,

[30] Hutchinson, *op. cit.*, vol. III, p. 527.

with the injunction that no one department shall exercise the powers of another department. The reason given to the world was—"to the end that this may be a government of laws and not of men." Reduced to its simplest terms, this statement means that a fusion of powers results in a government of men, which is despotism; whereas a separation of power guarantees a government of laws, which is free and responsible government. The colonists were afraid of centralized power. They would decentralize and deconcentrate power to the end that it might be weakened and rendered harmless. Then over the prostrate form of governmental power there would stand forth in all its beauty and grandeur the imposing figure of law, impersonal, impartial, exemplifying pure and abstract justice, unpolluted by contact with the human will. Above rulers and forms of government, above kings and parliaments, even above the people themselves, would rise the sovereign majesty of law.

READING NOTES

The law of the pendulum is clearly illustrated in the literature of the American Revolution. The older and more uncritical view that the colonists were victims of a carefully elaborated plan of their British rulers to enslave them has undergone modification as the result of more recent research. There has been a return to original sources. More attention has been given to the arguments of the loyalists, and the constitutional aspects of the case have been subjected to more careful review and evaluation. The net result is that a number of American historians seem disposed to belittle the case of the colonists in law and to judge the entire movement for independence in the light of popular leadership and propaganda. This extreme view has in turn brought reaction. Once again the constitutional case has been reexamined, and the conclusion has been reached that the nature of the empire did afford good grounds for a protest against parliamentary supremacy and a demand for self-government.

The older view is ably expounded in the glowing pages of George Bancroft's *History of the United States.* Nearer to the events than recent and contemporary historians, Bancroft adopted *in toto* the position of the popular leaders of the Revolution. In his theory, the War of Independence was a struggle against tyranny on the part of a liberty-loving and oppressed people. All the right was on one side, and all the wrong was on the other. But contemporary realists in American history look upon Bancroft's position as one-sided. They protest against partial history; they wish to balance up the rights and wrongs of the Revolutionary period; they would draw a true picture of both loyalist and patriot. Such an attempt is made by Sydney George Fisher in *The True History of the American Revolution* (1902),

continued and enlarged to two volumes in 1908, entitled *The Struggle for American Independence.* The same detached and realistic attitude characterizes the work of Arthur M. Schlesinger, in his *New Viewpoints in American History* (1922), and an earlier volume on *The Colonial Merchants and the American Revolution, 1763–1776* (1918). The economic motive bulks large in the eyes of the members of this new school of historical research. Charles H. McIlwain's *The American Revolution* (1923) marks a reaction against this extreme realism in American history. Trained in the law and thoroughly conversant with English constitutional history, Professor McIlwain brings to his study of the nature of the British Empire a wealth of information and a soundness of judgment equaled by few of his contemporaries. His conclusion is that the colonists had a probable case in law, at least one worth fighting for. An excellent treatment of the concept of fundamental law, which played an important part in the American Revolution, is to be found in *The High Court of Parliament* (1910), by the same author, especially Chapter II.

There is an abundance of other and less controversial material on the Revolutionary period. For entertaining description, the two volumes of John Fiske, *The American Revolution* (1891–1899), are unexcelled. By a careful selection of events, Richard Frothingham, in *The Rise of the Republic of the United States* (1872), makes the War of Independence pivotal in national development. The literature of the period had been sifted and the more important writings have been selected for treatment by Moses Coit Tyler in *The Literary History of the American Revolution,* 1763–1783 (2 vols. 1897). Carl L. Becker has attempted to reconstruct the mental and emotional atmosphere of the times in *The Eve of the Revolution* (1918). He has also done a good piece of work in treating historically and philosophically *The Declaration of Independence* (1922). The best analysis of the antecedents of the separation from the mother-country is to be found in Claude H. Van Tyne's *The Causes of the War of Independence* (1922). See also his *Loyalists in the American Revolution* (1912). In *Revolutionary New England,* 1691–1776, James Truslow Adams shifts the emphasis from the imperial to the social revolution within the colonies, brought about by the ever-receding frontier. The American student should not overlook the treatment of the Revolution by English writers. W. E. H. Lecky brought the solid scholarship and judicial temper of a recognized English historian to bear upon the problem of the separation, in his *History of England in the Eighteenth Century,* Volume III, Chapter XII, issued separately as *The American Revolution,* 1763–1783 (1898). Sir George Otto Trevelyan has produced a monumental work in six volumes on the *American Revolution* (1899–1914), written from the standpoint of English party politics. From Oxford University comes a sane and fair treatment of *The Causes and Character of the American Revolution* (1923) by H. E. Egerton.

Political theorists have not neglected the War of Independence. An admirable chapter on "The Political Theory of the Revolutionary Period" is to

be found in Charles E. Merriam's *History of American Political Theories.* The contribution of British North America to the problem of imperial organization is the central theme of a valuable book by Randolph Greenfield Adams entitled *Political Ideas of the American Revolution* (1922). In *The American Philosophy of Government* (1921), Alpheus Sidney Snow discusses, among other topics, the Declaration of Independence as the fundamental constitution of the United States. To make contact with the immediate sources of the political theory of the Revolution, the student must delve in the writings of James Otis, Samuel and John Adams, Thomas Jefferson, Thomas Paine, Patrick Henry, John Dickinson, and other leaders of public thought. The more remote sources must be sought in the literature of English revolutions, especially in the writings of John Milton, Algernon Sidney, James Harrington, and John Locke, as also in the radicalism of the Levellers.

CHAPTER III

THE POLITICAL THEORY OF THE FOUNDING FATHERS

I. Background of the Founders' Theory

The Constitution of the United States was born of a spirit of disillusionment and reaction. The high and fine idealism of the Revolution had been shattered by contact with grim reality. The sacred union, formed and cemented by opposition to a common enemy, had dissolved under the disintegrating alchemy of independence, and in its place there had sprung up the ugly form of colonial jealousy and political particularism. Released from imperial control, and not yet subjected to adequate federal control, the revolutionary states plunged into every excess of majority rule, such as agrarian laws and leveling schemes, evasions and cancellations of debts, and other violations of the obligation of contracts, culminating in bills of attainder, banishments, and confiscations.[1] Citizens were deprived of the rights of life, liberty, and property without due process of law. The spirit of independence seemed to brook ill any and every restraint of government which conflicted with personal liberty and private property, going to the length of rebellion in Massachusetts. Moreover, economic depression added its quota to the general discontent. The failure of the Confederation to measure up to the requirements of a national government in matters of taxation, regulation of commerce, and enforcement of treaties prepared the minds of many for the rise of a new political realism which was to place order and stability ahead of equality, liberty, and majority rule. Interests were emphasized more than natural rights, and governmental machinery, so organized as to protect minority interests, was planned and elaborated without much thought for the fine-spun theories of a state of nature and of social compact. Especially was it desired to protect the rights of property; and to that end a clear-cut separation and balancing of powers was projected, accompanied by a strengthening of the executive arm.

[1] *The Records of the Federal Convention of 1787*, edited by Max Farrand (3 vols., 1911), vol. I, p. 172; vol. III, p. 451.

This new political realism was pessimistic in its psychology. It regarded mankind as naturally vicious and depraved, actuated by selfish motives of ambition and interest. Men love power, it held, and will abuse its exercise unless curbed by firm and vigorous government. Democracy was regarded as the worst of all political evils, because under the guise of popular rule unbridled majorities might violate the rights of minorities, especially the right of property. A strong and well-balanced government, therefore, was regarded as indispensable to the checking and control of "democratic licentiousness." The equality and liberty of the Declaration of Independence found scant welcome in this new political philosophy; rather the first place was reserved for the ideas of order, stability, and the rights of property. The high-sounding idealism of the Declaration of Independence had lost its appeal. A new day had dawned, and a new note was struck.

But the traditions of the Revolution were so firmly implanted in the consciousness of the people that they could not be uprooted entirely. Hence there grew up, side by side, two divergent and competing systems of political philosophy: one idealistic and doctrinaire, reminiscent of the Revolution; the other, realistic and practical, based upon dearly bought experience, taking its tone and color from the "critical period" following the Revolution. The one made much of reason, natural rights, liberty, equality, sovereignty of the people, democracy, and first principles; the other stressed interests, experience, forms of organization, especially balance of powers. The one was optimistic, confident that men could be trusted, and that faith in government was a *sine qua non* of every political system; the other was pessimistic, viewing human nature as depraved and in need of constant watching and checking, and aimed always at a form of government that should be proof against selfish and designing men. The one represented the spirit of youth breaking with authority and experimenting with its new-found freedom; the other represented the spirit of maturity which had found the freedom of revolution to be only license, and wished a return to the tried and orderly processes of established and strong government. While, on the whole, in the making of the Constitution the balance tipped toward political realism, there were not wanting, even in the instrument itself, evidences of political idealism. It is true that the form of government, as it came from the hands of the framers, was not conspicuously democratic; but it was an excellent example of republican government, devoid of king or hereditary ruler. It did issue from the people, and to them it had to return for remodeling. One house of the legislature

rested on the principle of national representation. Only by comparison with the principles of the Revolution could it be called reactionary. In comparison with a hereditary monarchy, based upon a landed aristocracy, it was liberal and even democratic. The obstacles which the Constitution put in the way of the immediate rule of the majority were for the purpose of establishing a government of laws in contradistinction to a government of men. If the sovereignty of law is undemocratic, then the Constitution of the United States is undemocratic.

II. Types of Political Philosophy

In the Constitutional Convention which met at Philadelphia, in 1787, the outstanding exponent of the doctrinaire philosophy of the Revolution was Luther Martin of Maryland. As long as he remained he was the uncompromising champion of the cause of the small states. To defend his position he drew heavily for his weapons on the old arsenal of the *Naturrecht* school: equality in a state of nature, social compact, and consent of the governed. He even went back to the sources of revolutionary political theory, to Locke, Vattel, Priestly, Rutherford, and once again dragged out those Samsons to do duty against a new lot of Philistines. His purpose, of course, was to defend federalism against nationalism, thereby defending the rights and interests of the small states; for federalism is based upon the principle of equality. His argument might be summarized somewhat as follows: The Revolution threw the thirteen colonies into a state of nature with respect to one another; the Confederation was a compact between states based upon the principle of equality and reciprocity, and it was upon this basis that the new structure should be reared; even if the Confederation were dissolved, the states would be plunged back into their original condition where all their rights and sovereignties would be reserved.[2] Martin denied that the Confederation could be dissolved without the consent of the state legislatures, because it was a compact formed by consent. Thus he always came out where he started, with the principle of absolute equality. If the principles of the Confederation were to be retained, the new union would have to be based upon the equality of states; if the Confederation should be dissolved by the revolutionary action of ignoring the state legislatures and appealing directly to the people in conventions for

[2] *Op. cit.*, vol. I, pp. 324, 437.

ratification of the Constitution, even then the principle of equality would be paramount, because such action would plunge all back into a state of nature where equality reigns. One passage from Martin's speeches will make clear his indebtedness to the philosophy of natural rights: "States, when once formed, are considered with respect to each other, as individuals in a state of nature; that like individuals, each State is considered equally free and equally independent. . . . That, when a number of States unite themselves under a federal government, the same principles apply to them as when a number of individual men unite themselves under a state government." [3] It was a neat and logical construction which could not be overthrown without reversion to first principles; and, as events proved, the Convention did not hesitate to revert to revolutionary principles to find justification of its revolutionary work. It took Martin at his own word and went back to the people as represented in conventions to obtain ratification for a new scheme based partly on absolute equality and partly on proportional equality. Indeed, it is difficult to see how faithful members of the *Naturrecht* school could deny the people the right to set up their own form of government. The Declaration of Independence definitely grants them this.

As an exponent of the new political realism which was emerging, Gouverneur Morris of Pennsylvania and New York may be singled out. Morris was entirely unmoved by the high-sounding principles of the Revolution. An avowed champion of strong government, he did not devote much thought to the problem of liberty; nor was he at all interested in equality in the abstract. In fact, he believed in a certain natural inequality, in an aristocracy of ability and virtue and wealth. The primary end of government he held to be the protection of property. Accordingly he advocated a property qualification for suffrage and the organization of the Senate as an independent, aristocratic body founded upon wealth, its members chosen for life. His model seems to have been the British Constitution. He was fearful of the excesses of democracy and was openly cynical in his attitude toward the permanence of democratic government. One might as well construct a palace on the surface of the sea and expect it to stand, he thought, as to hope for much from government by the people. He was actually suspicious of the ignorant and propertyless classes, as well as of all persons in power, whether rich or poor. He advocated the checking of one interest by another, one vice by another. In fairness to him,

[3] *Op. cit.*, vol. III, p. 183.

however, it should be added that the ultimate goal of his political philosophy was a balancing of "the weight of wealth" against numbers, the balancing of property rights against the spirit of democracy, to the end that order and stability might be achieved. He would, if possible, so organize government, as to cancel out selfishness and self-seeking, leaving only a solid residuum of order and stability. However, it is impossible to explain away, except on the grounds of reaction and realism, Morris' attitude toward the rising states of the West. He unblushingly advocated some arrangement that would give to the Atlantic states a permanent preponderance in national counsels, regardless of the westward growth of the population. The interests of the two sections would differ, he thought, and it might endanger public welfare to allow the new western states equal voting power with the old and stable communities of the Atlantic seaboard. In particular, the new states might not be scrupulously careful about involving the country in war, the burdens of which would fall principally on the old states.[4] Could there be a doctrine more realistic than that? Let the eastern states protect their interests even by resort to inequality. Political control is a vested right; let care be taken to preserve it. Surely this was a far cry from the doctrine of the consent of the governed as expressed in the Declaration of Independence. Morris, it would seem, would make a new declaration, namely, the *dependence* of the rising states of the West.

A position intermediate between the political idealism of the Revolution and the political realism of the "critical period" was taken by James Wilson of Pennsylvania, one of the most gifted members of a remarkably gifted assembly. Wilson looked back to the Revolution and sympathized with its idealism; yet he looked forward to a new day and a new form of organization which might be strong enough to bear the weight of increased power and responsibility. He never forgot that the source of political authority was the people, and yet he never lost contact with reality. He favored a strong government based upon the doctrine of popular sovereignty. The cornerstone of his political philosophy was nationalism. Ever and anon he harked back to the sacred union of the Revolution as a cure for the rivalries, jealousies, and political particularism which had cropped out once independence had been gained. "We must remember," he said, "the language with which we began the Revolution; it was this: Virginia is no more, Massachusetts is no more—we are one in name, let us be

[4] *Op. cit.*, I, 533.

one in truth and fact.'' [5] Upon that foundation Wilson built his theory of national government. He denied that the colonies had been thrown into a state of nature by their separation from Great Britain; rather, he contended, there was a transfer of sovereignty from the crown to the colonies in their corporative capacity. Upon the solid rock of national sovereignty he would organize a national government, with national powers and national functions. The states would have to surrender some of their rights, he thought, just as individuals surrender the natural rights of life, liberty, property, and character when they enter civil society. So his doctrine of the supremacy of the national government rested upon a revival of the sacred union of the Revolution and upon an analogy to the social compact in which states replaced individuals.

In the end it was this mediate type of political philosophy which won the day. The good sense and political sagacity which enabled Wilson and others to combine the ideas of democracy with those of strong government left their impress on the Constitution itself. Compromise was necessary, and Wilson was broad-minded enough to see it. He favored two branches of the legislature, a single executive, an electoral college, and judges appointed by the executive. He opposed a President's council and the abolition of the state governments. Thus far his judgment was unerring; it coincided precisely with the results of the Convention. On the question of an absolute veto for the President, however, and also as regards the basis of representation in the Senate, as well as the direct election of senators, he found himself at variance with the majority of the Convention. But in light of the extreme views of Martin and of Morris, Wilson would have to be characterized as a moderate. He traveled in the middle of the road.

There were, then, three general types of political thinking represented in the Federal Convention: (1) revolutionary, in the sense of a return to the underlying principles of the American Revolution, (2) reactionary, and (3) moderate or mediate. Throughout the proceedings questions were constantly cropping up which involved fundamental principles of government, even political theory. Did the framers have the right to go beyond their instructions, rebuilding rather than revising? When states form a union—a sort of governmental pact—are they expected to surrender certain rights, just as individuals do in drawing up a social compact? What part in the new frame of government should be reserved to the people? These ques-

[5] *Op. cit.*, vol. I, p. 172.

tions involve such principles of political theory as the right of revolution, social compact, and popular sovereignty. To what extent ought interests and property rights to be represented in political organizations? What are the ends of government? What is the nature of sovereignty, and where is its locus? To answer these and similar questions, the framers delved deeply into the sources of political theory. They ransacked the equipment of the *Naturrecht* school, taking what they wanted and discarding what they did not want. They levied on the history of sovereignty. They discussed the nature and ends of government. Their foundations rested upon experience, it is true, but their superstructure towered into the heights of political speculation. At least they had recourse to political theory to rationalize that part of their work which might appear novel and even revolutionary. They were not visionaries, but they were men of vision; and at some points they were obliged to go beyond existing political institutions and launch out upon the uncharted sea of political philosophy.

III. Political Idealism

The basic question of the Convention related to the right of the framers to draw up a constitution departing radically from the Articles of Confederation. That the new Constitution was a radical departure, there can be little doubt. The Confederation was a "federal" government, based upon state sovereignty and equality of representation. The new union was essentially "national," with some pronounced federal features, notably the Senate. The Confederation was little more than a continuing assembly of diplomats; the new union was a national state. The Congress of the Confederation had passed a resolution on February 21, 1787, to the effect that it was expedient that a convention be held the following May in the city of Philadelphia "for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of the Government and the preservation of the Union." In sending delegates to the Federal Convention the states took their cue, for the most part, from the resolution of the Congress; and from the wording of the resolution it would seem plain that revision alone was intended, for the Congress had no authority to sanction anything more. The state legislatures, sworn to support the mode of amendment provided for in the Articles of Confederation,

could not have been called upon to confirm anything revolutionary. That would have been political suicide, and the Convention had the good sense not to suggest it. The discussion of this question became polarized, the state-rights group insisting upon the wording of the resolution, the nationalist group replying that the Convention was only proposing, since final action rested with the Congress and the states. It is true that there were some members, notably Hamilton, who attributed to the Convention full powers to reconstruct as well as revise; but certain leaders, such as Wilson, Madison, Randolph, and King, were less sure of this, and were not content to hide behind the provisional work of the Convention. They appealed to the right of public safety, to general welfare and first principles. James Wilson told the Pennsylvania ratifying convention that "the Federal Convention did not act at all upon the powers given to them by the states, but they proceeded upon original principles, and having framed a constitution which they thought would promote the happiness of their country, they have submitted it to their consideration, who may adopt it or reject it, as they please."[6] Madison fell back upon the revolutionary principle that "the people were, in fact, the fountain of all power, and by resorting to them, all difficulties were got over. They could alter constitutions as they pleased. It was a principle in the Bills of Rights, that first principles might be resorted to."[7] Rufus King justified the radical departure from the Articles of Confederation on the ground that Massachusetts for one must have contemplated a reversion to first principles when it sent delegates to the Convention.[8] Remarks reported by King, and thought to have been those of Hamilton, refer specifically to the right of revolution. "We must go all lengths to accomplish this object—if the legislatures have no powers to ratify because thereby they diminish their own sovereignty, the people may come in on revolution principles."[9] Randolph put public safety ahead of scruples concerning the competence of the Convention.

Thus in a somewhat guarded way the Founding Fathers did appeal to the right of revolution. In fact, practically all of the old baggage of natural rights, including the principles of equality, freedom, independence, sovereignty, and social compact, was dragged out to ex-

[6] McMaster and Stone, *Pennsylvania and the Federal Constitution* (1888), p. 235.

[7] Farrand, *op. cit.*, vol. II, p. 476.

[8] *Ibid.*, vol. II, p. 477.

[9] *Ibid.*, vol. I, p. 301.

plain, on the one hand, what the federal government ought to be, and on the other, what it was as it came from the hands of its framers. The state-rights group could not be lured away from the idea of equality, which they coupled with freedom, sovereignty, and independence, as applied to the states. They viewed the Confederation as a compact founded by unanimous consent, and held that, as such, it could not be dissolved except by unanimous consent. The New Jersey Plan introduced by Mr. Paterson was a deliberate attempt to shore up the old system. It would save the freedom, independence, sovereignty, and equality of the states by basing representation solely on the "federal" principle. Back of such demands, of course, were the interests of small states, and back of them other interests, such as public lands, slavery, manufacturing, and commerce; but the convenient peg on which to hang the demands of the state-rights group was that of the *Naturrecht*—equality coupled with freedom, sovereignty, and independence.

Madison turned the tables on the state-rights group by probing a little deeper into the nature of compacts. He differentiated between social compacts by which individuals emerge from a state of nature into a state of civil society, and compacts among states, governed by the law of nations. In both cases, however, he failed to find the principle of the opposition that unanimous consent was necessary for the dissolution of a compact. "If we consider the federal union as analogous to the fundamental compact by which individuals compose one society, and which must in its theoretic origin at least, have been the unanimous act of the component members, it cannot be said that no dissolution of the compact can be effected without unanimous consent. A breach of the fundamental principles of the compact by a part of the society would certainly absolve the other part from their obligations to it."[10] Likewise in compacts governed by the law of nations "a breach of any one article, by any one party, leaves all the other parties at liberty to consider the whole convention as dissolved, unless they choose rather to compel the delinquent party to repair the breach."[11] The effect of an argument of this kind was to shake the foundations of the Confederation, and to open the way for a thoroughgoing reconstruction, with a possible abandonment of the federal principle of equality. It is not necessary to decide as between Paterson and Madison in order to point out that a very important discussion turned on a cardinal concept of the political theory of the *Naturrecht* school, namely, the compact.

[10] *Op. cit.*, vol. I, p. 314.
[11] *Ibid.*, vol. I, p. 315.

Perhaps the most authoritative statement of the natural rights philosophy made during the Convention is contained in the letter sent by the Federal Convention on September 17, 1787, transmitting the Constitution for the consideration of Congress. The letter explained that a national framework was necessary to support national powers which had to be conferred, such as war, peace, treaties, taxation, and regulation of commerce, and that it would be dangerous to vest so much power in a council of a league such as the Confederation was. Sensible of the fact that the new plan of government involved the surrender of some state rights, the Convention sought to justify such surrender by the analogy of individuals entering civil society. "Individuals entering into society must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstance as on the object to be obtained. It is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be reserved; and on the present occasion this difficulty was increased by a difference among the several states as to their situation, extent, habits, and particular interests."[12] The question of the surrender of some natural rights and the reservation of others is reminiscent of John Locke and the revolutionary philosophy. To that the Fathers reverted in order to justify their deviation from the original plan. Thus the Convention invoked the old, time-worn theory of a state of nature, natural rights, and delegation coupled with reservation, to square itself with Congress for having transcended its authority. It was a fitting appeal to the principles of the Revolution on the part of men whose work had indeed been revolutionary. The "more perfect union" was sanctified, sent on its way, and made palatable to the defenders of the imperfect union by reference to a common stock of ideas which had currency everywhere. Even the champions of the old order scarcely had the temerity to repudiate John Locke.

In spite of all that has been written concerning the reactionary character of the Constitution, the fact is, as can be proved from the records of the Federal Convention, that the framers were not unmindful of the rights of the people. It is true that an attack was directed against the excesses of democracy, but the underlying principles of democracy, e.g., that political power is derived from the people, that government is instituted for the good of those who live under it, and that the "genius" of the people must be consulted in drawing up forms—these and other democratic principles were acknowledged

[12] *Ibid.*, vol. II, pp. 666–67.

and acted upon. James Wilson summed up the matter admirably as follows: "In its principles, Sir, it [Constitution] is purely democratical; varying indeed, in its form, in order to admit all the advantages, and to exclude all the disadvantages which are incidental to the known and established constitutions of government."[13] Not only was the popular source of the Constitution declared in the preamble, but it was even more decisively acknowledged by the insistence of the framers that the instrument should be ratified by conventions in the several states chosen by the people thereof, and not by the state legislatures. It was in defense of this plan that Madison announced so clearly the doctrine of popular sovereignty. One branch of the legislature was to emanate directly from the people. The streams of power flowing through the Constitution, with all their wealth of blessing to mankind, Wilson traced "to the one great and noble source, THE PEOPLE."[14] Even Hamilton, somewhat detached from the rank and file as he was, felt the necessity of laying the foundations of the American empire "on the solid basis of *the consent of the people.*"[15] The broad basis of the new nationalism was to be none other than the authority of the sovereign people.

Furthermore, in shaping the new framework, consideration was given to the genius of the people. The Constitution is not monarchical. Wilson argued eloquently and effectively that the genius of the people was essentially republican and that the new government would have to reflect their character. He refused to regard the British Constitution as a model. "The British Government," he said, "cannot be our model. We have no materials for a similar one. Our manners, our laws, the abolition of entails and of primogeniture, the whole genius of the people, are opposed to it."[16] The Constitution is at least republican. The House of Representatives is democratic, and the whole plan rests upon a semi-popular ratification. There was at first no bill of rights appended or prefixed. To George Mason and others this was a stumbling-block and a sure sign of malevolent reaction; but the Fathers defended themselves on the ground that the entire Constitution was a bill of rights, that it set up a government founded upon the will of the people; and surely the people needed no protection against themselves. Speaking against a strong executive, Colonel Mason of Virginia warned the Convention that the people would

[13] *Ibid.*, vol. III, p. 142.
[14] *Ibid.*, vol. III, p. 143.
[15] *Federalist*, No. XXII.
[16] Farrand, *op. cit.*, vol. I, p. 153.

look askance at anything savoring of monarchy. He said: "Notwithstanding the oppressions and injustice experienced among us from democracy, the genius of the people is in favor of it, and the genius of the people must be consulted."[17] But criticisms of the Constitution, founded on the absence of any declaration of rights, were echoed in the state ratifying conventions, and they took such hold on the people that the Constitution was ratified with the understanding that a bill of rights should be added by way of amendment.

IV. Political Realism

Having briefly described some principles of political idealism which were invoked in the Federal Convention, such as equality, popular sovereignty, independence, natural rights, and compact—invoked doubtless in some cases for the purpose of rationalizing demands founded upon interests—we may find it useful and interesting to contrast with them certain principles of political realism which appeared, and were likewise used for purposes of rationalization. The realists of the Convention made much of experience. They praised highly, even to adulation, the basic principles of the British Constitution. They passed over lightly the theory of natural rights—inalienable, indefeasible, and imprescriptible. They cared more for interests, especially the property interest. They favored a strong government which could protect the interests of the minority against the tyranny of the majority. Some would even have swept away the states entirely and set up a centralized and consolidated form of government. The intelligence and patriotism of the masses were rated low by certain members of the Convention; the way should be open, they thought, for "a just preference of merit." Much water had run under the bridge since those halcyon days of the Revolution when equality, liberty, and independence were proclaimed from the housetops, accompanied by pæans of praise dedicated to natural and inalienable rights.

The key-note of the realistic psychology was struck by James Madison when he said: "We must not shut our eyes to the nature of man, nor to the light of experience. Who would rely on a fair decision from three individuals if two had an interest in the case opposed to the rights of the third?"[18] Accordingly Madison sought some method of dividing and balancing interests to the end that the designs of an in-

[17] *Ibid.*, vol. I, p. 101.
[18] Farrand, *op. cit.*, vol. III, p. 451.

terested majority might be frustrated. The idealist's faith in honesty, respect for character, conscience, and religion, as restraining bonds of an interested majority, was not shared by Madison. He had been disillusioned. In the midst of conflicting sects, factions, and interests, the poor pitted against the rich, the debtors against the creditors, the landowners against the manufacturers, merchants, and bankers, he felt that the only hope for justice and fair play was to forestall the formation of interested majorities. This was to be done by breaking up the community into a multitude of interests and parties, and enlarging the sphere of government to such an extent that there should be no one focus of interest. A major and a minor interest are the result of a small and compact community, Madison seems to have argued. Increase the size of the community, bring in new interests and parties, and there will be no opportunity for polarization. Madison argued for the prevention of the formation and consolidation of a determinate majority interest. In case it should form, there would be difficulty in securing united action if the community were large and diversified. But in spite of Madison's warning, and in spite of the westward expansion of the nation, interests did polarize into major and minor, anti-slavery and pro-slavery, until the issue had finally to be settled by resort to arms.

The institutional expression of the fear that an interested majority might tyrannize over a helpless minority is the system of checks and balances, based upon the separation of powers. Much was made of this principle in the Convention, and again in the campaign for ratification. The "great Montesquieu" was appealed to as the oracle on this point. The preservation of liberty, according to his philosophy, was conditional upon a separation of powers and a system of mutual checks, such as he mistakenly thought to exist in the British Constitution. When he wrote his *L'Esprit des Lois* the British government was fast hastening toward a fusion of powers, through the cabinet-parliamentary type; but his political philosophy caught and crystallized for all time to come the older system in which power checked power. His works were widely read in America, and his central thesis that liberty depended upon a separation of powers, with reciprocal checks and balances, took fast hold of the mind of the Fathers and was incorporated in the Constitution. The discussions concerning the executive veto, a bicameral legislature, the powers of the Senate, judicial review, and federalism, all turned on this pivot. John Adams, possessed of a remarkably keen scent for checks and balances, discovered no less than eight in the Federal Constitution: the check of

the states upon the nation; the House of Representatives upon the Senate; the Executive upon the Legislature; the Judiciary upon the House of Representatives, Senate, Executive, and state governments; the Senate upon the President; the people upon their representatives; the state legislatures upon the Senate; and the presidential electors upon the people. All of this is conclusive proof that the time of legislative supremacy, based upon the rule of the numerical majority, had passed away with the idealism of the Revolution. A new day had dawned, and with it had come a new psychology of politics. Government was to be made as near "fool-proof" as possible. Mechanical and automatic checks were to insure the rule of law, even in the midst of conflicting interests, sects, and parties.

The psychology of realism cropped out in many other ways. The anti-democratic sentiment of certain members of the Federal Convention was a reflection of it. In view of the craze for paper money, which was a legal form of confiscation, it was thought by some members that the good sense of the people was not to be trusted in such matters. General Pinckney pointed with pride to the legislature of South Carolina which had withstood this popular demand. "A majority of the people in South Carolina were notoriously for paper money as a legal tender; the Legislature had refused to make it legal tender. The reason was that the latter had some sense of character and were restrained by that consideration."[19] Elbridge Gerry of Massachusetts was almost brutal in his strictures upon democracy. He bemoaned the evils of an excess of democracy, the danger of a leveling spirit, the want of virtue in the people, and characterized the democracy of Massachusetts as "the worst . . . of all political evils."[20] The "turbulence and follies of democracy" were enlarged upon; the "fury" of it was paraded before the Convention to convince the members of the necessity for a strong and balanced government, in contradistinction to the legislative supremacy of the revolutionary period. A firm and conservative senate was advocated as an offset to the democracy of the lower house. Election of senators by the state legislatures would, it was thought, bring forward men of wealth and talents, a sort of republican aristocracy to serve as a balance over and against the instability and irresponsibility of the multitude. Thus it might be said that the House of Representatives is a monument to the spirit of political idealism awakened by the War for Independence, and the Senate, as it came from the hands of the framers, a monument to the

[19] Farrand, *op. cit.*, vol. I, p. 137.
[20] *Ibid.*, vol. II, p. 647.

spirit of political realism which emerged from the "critical period" following the War for Independence. Together they represent a compromise between two systems of political philosophy.

Nor should it be forgotten that there was some squinting toward the British Constitution in the Federal Convention at Philadelphia. John Dickinson of Pennsylvania was outspoken in his praise of the English form of government; and he did not stop with praise. In advocating that the Senate be formed indirectly, senators chosen by the legislatures of the several states, Dickinson had in mind that the upper house would draw to itself men of wealth and family, thus approximating the English House of Lords. Alexander Hamilton believed in strong government, and in the abstract was not averse to monarchy; but the Hamilton Plan contains no reference to monarchy. It does provide for a life term for senators, and for a strong executive with an absolute veto on laws. Naturally he found himself at variance with some of his colleagues and with the prevailing ideas of the Convention; but he was one of the signers, and he was among those who worked most assiduously for the ratification of the Constitution by the states. Hamilton was a conservative, and an admirer of the British Constitution, but he was not in favor of setting up a throne in the New World. It cannot be said that the British Constitution served as a model for the framers of the American Constitution. There were reasons for establishing a firm and conservative Senate other than a desire to introduce an organ similar to the House of Peers. But there was a small group of men in the Convention who could not forget their British antecedents; and when they raised their voices in defense of any proposition, it is safe to assume that they did so, not for a principle reminiscent of the Revolution, with its ideas of equality and independence, but from a spirit of disillusionment and reaction, and from a lingering admiration for the old order of imperial days. In short, British political traditions contributed something to the philosophy of realism which swayed the members of the Convention and produced an instrument of government which differed widely, for the most part, from the revolutionary state constitutions.

The rivalry between North and South left little room for idealism. Despite Madison's earnest warning, interests had already become polarized. The South wished to protect its peculiar institution, slavery, and was loath to permit anything in the Constitution which might prejudice its right to do so. The North, as a whole, was not antislavery, but it objected to the system of allowing slaves to be counted

both as property and as constituents. One of the clearest expressions of the psychology of political realism was called out by the discussion of slavery in the Federal Convention. Luther Martin was an idealist *par excellence.* His soul loathed compromise as Nature loathes a vacuum. He would not compromise with slavery. He favored the prohibition of the importation of slaves or a tax on their importation. He thought that the three-fifths arrangement would encourage the slave trade; that slaves weakened one part of the union which other parts were obliged to protect; and that the recognition of slavery thus given by the Constitution was "inconsistent with the principles of the revolution and dishonorable to the American character." This declaration of humanitarianism, based upon the fine idealism of the Revolution, aroused the ire of a distinguished South Carolinian and drew from him a statement of his political philosophy which would have done credit to the realism of Machiavelli. John Rutledge replied that he did not see how the three-fifths arrangement would encourage the importation of slaves; that he would release the other states from protecting the South against insurrections; and that "*Religion and humanity had nothing to do with this question.—Interest alone is the governing principle with nations.* . . . If the Northern States consult their interest, they will not oppose the increase of slaves which will increase the commodities of which they will become the carriers."[21] Plainly the philosophy of the slave-holding South rested upon interest; its peculiar form of property had to be protected at all hazards. With the specter of slavery haunting the Convention it is small wonder that the men who attempted to form a "more perfect union" were driven from the mountain-tops of idealism down into the valleys of realism and compromise. In no other way could a union have been formed. As Rutledge pointed out, the real question at issue was whether or not the South would be a party to the new arrangement. Had its peculiar interests not been recognized and cared for, the likelihood is that it would have formed a separate confederacy in the beginning. In such a superheated atmosphere it was inevitable that the doctrinaire philosophy of the Revolution would have to be abandoned. It was proclaimed and had its effect, but a strong undercurrent of realism set in which made the new union a patchwork of conflicting interests and sectional compromises. Not until a rebirth of the revolutionary idealism under Lincoln did the promise of liberty and equality in the Declaration of Independence find its fulfilment.

[21] Farrand, *op. cit.*, vol. II, p. 364. (Italics not in the original.)

There were, then, two principal schools of political theory in the Constitutional Convention. Both represented attempts to rationalize given sets of interests—geographical, mercantile, manufacturing, and moneyed. But they were not inventions of the day; they had roots in the past. To all who, for reasons of their own, desired the equality of states in the new union, the political philosophy of the Revolution, with its emphasis upon liberty and equality, made a strong appeal; to all who desired proportional equality, giving scope to the development of the large states, a more conservative philosophy appealed. So far as the states as bodies politic were concerned, the latter appeal was plainly a philosophy of inequality. Insofar also as the new government was based upon a separation of powers, coupled with checks and balances, it represented a drift away from democracy. Frequent references were made to wealth and ability as offsets to democratic licentiousness. Some even went so far as to laud the British Constitution as a model of conservative balancing of conflicting interests. Thus there arose in the Convention a party which was forced to turn its back on the Revolution; or one might say that it reverted to a pre-revolutionary order of things, that is, to the conservative British order with its emphasis upon authority and property rights. In any event the political theory of the Convention was not a thing apart; it had antecedents. It was called out by the work in hand, but it was not created thereby. What the Convention did was to give a new orientation to old theories. It took old materials and used them to build a new structure. A part it shaped according to the architectonic principles of the Revolution; and another part it shaped after older and more conservative models. It was for the future to decide which part was to be further developed, or, if possible, to harmonize better the two conflicting philosophies. In the main, the evolution of the Constitution by amendment, and by custom, has been toward the rule of the majority, through party control and the direct election of senators. The bulwark of the old order has been the principle of judicial review as interpreted by the Supreme Court. Through it property rights are conserved and a balance of interests is maintained.

V. Problems in Theory

There remain two questions of political theory which arose in the Constitutional Convention. At first these appear abstract and remote from practical issues; but actually such is not the case. The two

questions were: (1) what are the ends of the state? (2) what is the nature and locus of sovereignty? As regards the ends of the state, there were some members who entertained what might be described as a broad, philosophical theory; others who held a narrow, economic theory; and still others who occupied a mediate position between these extremes. To begin with the economic theory, we may say that it was nothing more or less than that government was instituted to protect property rights. Gouverneur Morris proclaimed unabashed that the protection of property was the main object of civil society. The protection of life and liberty, he thought, was much better organized in the pre-civil state. Therefore, if men left the state of nature and formed civil society it was logically for the sole purpose of protecting their property. James Wilson, on the other hand, refused to subscribe to this economic interpretation of government. He denied the protection of property the first place among the ends of government. Certain imponderables, such as "the cultivation and improvement of the human mind," were to be ranked higher and considered more noble than strictly property rights. Consequently numbers should take precedence of wealth in the process of determining the measure of representation. James Madison combined "the security of property and public safety" as the primary objects of government. Perhaps caution should be exercised in giving a narrow interpretation to the term "property," as used by the Founding Fathers. They were saturated with the political philosophy of John Locke, who gave to "property" an interpretation broad enough to include life, liberty, and estate. However, in view of the democratic excesses of the post-revolutionary period, with its wholesale confiscations of property by interested majorities, it is fair to assume that the Fathers meant to give a somewhat narrower connotation to the term "property," having in mind chiefly economic values. They wished to protect the property of the creditor against the debtor, of the merchant against the landowner, and of all minorities against tyrannical majorities. They were speaking in terms of economics. Hence their philosophy as to the ends of government proves to be not so abstract after all, but rather a concrete application to the matter in hand of a set of ideas which had been part of their mental equipment from the days when "the great Mr. Locke" was appealed to for the purpose of justifying resistance to taxation without representation. It might even be argued that they outdid Locke himself in their desire to protect property.

The question of sovereignty bobbed up repeatedly in the discussions concerning the nature of the union. The small-states group

wished to preserve the strictly federal principle of the Confederation, namely, equality of large and small states based upon state sovereignty. They harked back again and again to the conception of the treaty of 1783 with its free, sovereign, and independent states. They would not go beyond "a union of the states merely federal." They viewed the Articles of Confederation as a federal compact or a sort of treaty between states founded upon "equal sovereignty." Mr. Paterson of New Jersey was tenacious on this point, and threw his argument into the form of a dilemma: If it be argued that the Confederation has collapsed, then all the states are back on a footing of equality and independence; if it be argued that the "federal compact" is still in existence, the states are sovereign, free, and independent. The New Jersey Plan was an attempt to patch up the old Confederation, thus perpetuating the principle of a permanent league of states rather than a united state. The nationalists, on the other hand, conceived sovereignty as an integral thing, incapable of division, and properly lodged in the union itself. Gouverneur Morris confessed himself unable to "conceive of a government in which there can exist two *supremes.*" He regarded the purpose of the Convention to be the establishment of a "supreme government capable of 'the common defense, security of liberty and general welfare.'"[22] The matter came up concretely when an attempt was made to define treason. Should treason be regarded as a crime against the Federal Government alone or a crime against the states as well? Dr. Johnson of Connecticut was of the opinion that there could be no treason against a state, since sovereignty was lodged in the Union. The nationalists pressed the battle home. They reduced the states, even under the Articles of Confederation, to subordinate corporations without the right to make war and peace, or to contract treaties. Hamilton stigmatized the states as "artificial beings." Wilson referred to them as "imaginary beings called states," and contrasted their rights with the "rights of men." The new union, according to the nationalists, was to have a national character; it was to rest upon citizens and not upon states.

Neither the strictly federalist nor the strictly nationalist position was adopted; but a compromise was struck embodying features of both. It was the doctrine of divided sovereignty in a federal union. Madison pointed out certain limitations on the sovereignty of the states under the Confederation and showed how under the new

[22] Farrand, *op. cit.*, vol. I, p. 43.

government powers of state sovereignty would be further reduced. The *Federalist* is clear and explicit on this point. It interprets equal representation in the Senate as proof of divided sovereignty. "In this spirit it may be remarked, that the equal vote allowed to each state is at once a constitutional recognition of the portion of sovereignty remaining in the individual states, and an instrument for preserving that residuary sovereignty."[23] Explaining to the people of New York the relation of the states to the nation under the new Constitution about to be voted on, Madison put the "solid happiness of the people" before the sovereignty of the states, and submitted that in case of conflict the latter would have to undergo modification. Yet there would remain an "unsacrificed residue" of state sovereignty: ". . . the states will retain, under the proposed Constitution, a very extensive portion of active sovereignty."[24] To return again to the Convention, and to the question of treason, Colonel Mason of Virginia found no difficulty in differentiating between treason against a particular state and treason against the United States. "The United States will have a qualified sovereignty only. The individual states will retain a part of the sovereignty. An act may be treason against a particular state which is not so against the United States."[25] He cited Bacon's Rebellion in Virginia as an illustration of the doctrine. John Dickinson also explained equal representation in the Senate on the principle of residual sovereignty. The United States he regarded as "a combination of republics, each retaining all the rights of supreme sovereignty, excepting such as ought to be contributed to the Union."[26] The most formal and authoritative expression of this doctrine, as it found lodgement in the minds of the members of the Constitutional Convention, is to be found in the letter already referred to, signed by George Washington as President and sent to Congress accompanying the completed work. The essence of it was that the states would have to sacrifice a part of their independent sovereignty in order to form a union. It would be no more possible to form a permanent union of independent states without giving up a share of sovereignty than it would be to conceive of individuals passing from a state of nature to a state of civil society without parting with a share of their natural liberty. The two cases were perfectly analogous, so the Convention thought. The only remain-

[23] *Federalist*, No. LXII.
[24] *Ibid.*, No. XLV.
[25] Farrand, *op. cit.*, vol. II, p. 347.
[26] *Ibid.*, vol. III, p. 304.

ing question was: how great should the sacrifice be? The Convention was fully aware of the difficulty of drawing a line between rights to be surrendered and rights to be reserved, but it felt that such a line had to be drawn. And the rights in question were those of "independent sovereignty."

Perhaps it is fortunate that the Founding Fathers were not able to settle these questions for all time. They made a beginning: their successors in after-years have carried the work forward. They laid the foundations, and others have builded upon them. The question of the nature of the union, involving, as it did, the theory of compact and the theory of sovereignty, divided or unitary, rose to trouble later generations. Through a polarization of interests it became advantageous to the South, so it was thought, to insist upon a revival of the doctrine of state sovereignty, with its corollary of nullification and secession. Once again the question of the divisibility or indivisibility of sovereignty came to the fore, the upshot of it all being that the outstanding champion of state rights, John C. Calhoun, took his stand with those who believed in the indivisibility of sovereignty, save that he made a new application of the doctrine. He would lodge indivisible sovereignty in the states, thus swinging around the full circle to the strictly "federal" position of the state-rights group in the Convention. The Civil War cut the Gordian Knot of political theory, and settled for all time that the union was to be essentially national. There may be oscillations of the pendulum between state rights and federal authority, but the outstanding feature of the American system of government is that the Constitution is the supreme law of the land. The Fathers said it was so; the courts, aided by the turn of national events, have made it so.

READING NOTES

The framing of the Constitution of the United States is a topic of perennial interest. The secrecy of the Federal Convention and the momentous issues which hung in the balance combine to surround the work of the Founding Fathers with a halo of mystery and romance. Posterity has derived its information as to what took place behind the closed doors of the State House in Philadelphia principally from the *Journal of the Convention* and from Madison's *Debates.* The *Secret Proceedings,* published from notes taken by Robert Yates, together with memoranda of Rufus King, Alexander Hamilton, and others, serves to supplement the records of the *Journal* and the *Debates.* The most complete and trustworthy source of the acts and proceedings is Max Farrand's three bulky volumes entitled *The Records of the Federal*

Convention of 1787, a monument of painstaking effort and exact scholarship. The same author has summarized constructively the salient facts of the larger volumes in his *Framing the Constitution of the United States* (1913). In *Pamphlets on the Constitution of the United States* (1888), collected by Paul Leicester Ford, are to be found criticisms of the Constitution on the part of its early opponents. The *Federalist* still remains the best exposition of and the most illuminating commentary on the form of government devised by the Fathers.

George Bancroft attempted to work over the materials and bring out a connected history of the making of the Constitution. When it is recalled that he visited Madison in 1836 and spent a day with him, it will be conceded that he was in a favorable position to write a first-hand account of what took place in 1787. But years passed before Bancroft could carry out his plan. In 1882 he published a *History of the Formation of the Constitution of the United States of America,* an idealistic and uncritical account. Without attempting even to list all the works on the Constitution which have appeared, reference should be made to Charles A. Beard's *An Economic Interpretation of the Constitution,* which was published in 1913, because it challenges traditions of long standing and upsets many of our preconceived notions about the men who made the Constitution. Professor Beard applies the Marxian principle of the economic interpretation of history to the formation of the Constitution, and arrives at some startling and even revolutionary conclusions. His method has been challenged, but his reply has been to broaden the scope of his research and attempt to prove that Jeffersonian democracy, like the making of the Constitution, was the product principally of economic forces. The same author has proved beyond a doubt that the principle of judicial review was not unknown to the framers, in *The Supreme Court and the Constitution* (1912). Another book which carries a challenge is *The Spirit of American Government* (1907) by J. Allen Smith, a penetrating analysis of the undemocratic features of the Constitution.

It is now generally held that the Constitution is not a work that was struck off at a particular time, but rather the product of a long and slow evolution, forced at periods by dire necessity. How indispensable it was that some form of government adequate to national needs should be devised appears in John Fiske's *Critical Period of American History, 1783–1789* (1888), and in Andrew C. McLaughlin's *The Confederation and the Constitution* (1905). For further discussion of the development of the idea of the Constitution, see Sydney George Fisher, *The Evolution of the Constitution of the United States* (1897), James Harvey Robinson, *The Original and Derived Features of the Constitution* (1890), and Charles E. Stevens, *Sources of the Constitution of the United States* (1894). The other view, namely, that the federal system is an original creation, is emphasized by Hannis Taylor in *The Origin and Growth of the American Constitution* (1911).

The World War gave a new impetus to the study of the American system of government. Old political systems toppled and fell, and on their ruins

new forms were set up. The general wreck of civilization gave point to the inquiry, What is a good form of government? A number of studies of the Constitution of the United States, historical, expository, and critical, attempt to answer this question. In 1922 James M. Beck published a series of lectures, delivered under the auspices of the University of London, in a volume entitled *The Constitution of the United States.* The same year saw the appearance of an attempt to explain historically and legally each paragraph of our organic law, entitled *The Constitution of the United States: Its Sources and Application,* by Thomas James Norton. The Marshall-Wythe School of Government and Citizenship at William and Mary College has contributed a series of papers on the antecedents of the Constitution, together with an account of its actual making and ratification, entitled the *Genesis and Birth of the Federal Constitution* (1924), edited by President J. H. C. Chandler. Breckinridge Long has traced the unfolding of the idea of a union based upon a written constitution in *Genesis of the Constitution of the United States of America* (1926). An Englishman has performed a valuable service by pointing out the similarity between our Constitution and the unwritten constitution of Great Britain. See Herbert W. Horwill's *The Usages of the American Constitution* (1925). A comprehensive volume on the evolution, legal interpretation, and political theory of the Constitution is the work of Charles E. Martin, entitled *An Introduction to the Study of the American Constitution* (1926).

CHAPTER IV

THE POLITICAL THEORY OF FEDERALISM

I. Introductory

Later generations have not ceased to marvel at the political genius of the Fathers who framed the Constitution. It is, indeed, a masterpiece of political construction. It rests upon the broad and solid foundation of colonial experience; while at the same time it departs from all previous leagues and confederations in combining successfully in one political organization the principles of unity and diversity—one state carved out of many states, and still remaining both one and many. It is just this principle of duality, two sets of jurisdictions superimposed upon the same territory, that gives rise to much confusion of thought and clash of opinion in the interpretation of the Constitution. The federal government has its jurisdiction, involving rights and limitations; the state governments have their several jurisdictions, involving state rights and limitations; the individual is protected in his private rights against both federal and state governmental usurpation; and the people as a collective body have their place in the complicated structure. The Supreme Court has analyzed the powers of government which are to be found in "the complex system of polity which exists in this country" as follows: (1) those which belong exclusively to the states, (2) those which belong exclusively to the nation, (3) those which may be exercised concurrently and independently by both, and (4) those which may be exercised by the states, but not until Congress has seen fit to act upon the subject.[1] Time and circumstance, the rise of political parties, the polarization of interests between North and South, and the existence of slavery, all have served to single out now one set of powers, now another, emphasizing the delegated powers of the federal government or the reserved powers of the states, according to the prevailing opinion or interest of the moment. The political theory of constitutional interpretation is no less a system of rationalization than was the theory of the Founding Fathers. Interests beget opinions; what men think is often only a defense of the system of which they are a part.

[1] *Railroad Company v. Fuller*, 17 Wallace, 568.

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The political theory underlying the interpretation of the Constitution is to be found in debates on the floor of Congress, in statutes, decisions of courts, writings of public men, and in that mass of usage and custom which has grown up about the written instrument of government, and which is sometimes designated as the "unwritten constitution." In elaborating this body of theory it will be useful for us to proceed in the reverse order from that noted above. The first place should be reserved for the doctrine of popular sovereignty. How has the Constitution been construed in regard to the ultimate source of political authority, the people? Has any part of the political idealism of the Revolution which exalted the people to the highest pinnacle of glory been saved from the deluge, or did it all perish in the wave of reaction which swept over the country during the "critical period" and left its mark upon the Constitution itself? Second, what relation exists between the state and the individual? How has the balance between authority and liberty been struck? Is the individual protected in his private rights against governmental usurpation? Third, what is the nature of the union? What is the place of the states in the "more perfect union"? Is their relation to the federal government one of international law, preserving the sovereignty and independence of the several states, and carrying the implication of nullification and secession? Or is it a constitutional relationship, diminishing the sovereignty of the member states and establishing a national supremacy—in brief, a national state? What are the metes and bounds of the powers delegated to the federal government? What is the range of its implied powers? Does it share its sovereignty with the states? Is the body of enumerated and implied powers sufficient to constitute it a national state, as distinct from a league of states? These questions cannot be answered offhand. They are part of the warp and woof of political thought from 1789 to the close of the reconstruction period.

II. Sovereignty of the People

Quite early in the history of the new government a group of judges of the Circuit Court for the district of Pennsylvania, James Wilson among them, pointed out in a letter to the President of the United States, dated April 18, 1792, that the sum total of the legislative power of the United States was not vested in Congress, but that a part of it remained with the people. They differentiated between the legislative powers granted in the Constitution and lodged in Congress, and

those original, constituent powers not so granted. "It is worthy of remark," they wrote, "that in Congress the *whole* legislative power of the United States is not vested. An important part of that power was exercised by the people themselves, when they 'ordained and established the Constitution.' "[2] This is little more than a formal interpretation of the Tenth Amendment, which marks out an area of powers not delegated to the United States but reserved to the states, respectively, or to the people. State ratifying conventions had called attention to the danger of establishing a consolidated, national government clothed with legislative omni-competence and drawing to itself powers properly belonging to the several states and to the people. For example, in the Pennsylvania Convention of 1787 the Anti-Federalists proposed fifteen amendments which bore a striking resemblance to those drawn up by Madison in 1789 for the House of Representatives. The fifteenth reserved the sovereignty, freedom, and independence of the states and "every power, jurisdiction and right which is not by this Constitution expressly delegated to the United States in Congress assembled."[3] The first ten amendments were adopted by the Pennsylvania legislature on March 10, 1790.

In the early sessions of Congress a problem that concerned the place of the people in the new order of things centered in the ratio of representation in the House of Representatives. What should be the ratio of representation to population? Would one representative to every 30,000 inhabitants be sufficient to give the people the voice in their affairs to which they were entitled? This question was debated long and earnestly, and some harsh things were said about executive prerogative and an aristocratic upper house. Obviously there were some members who wished to bottom the lower house on wide representation for the purpose of checking the "monarchical and aristocratical part of the government," thus preserving the liberties of the people. They wished to give the people a share in government. Democracy, defined as government by the whole body of the people, they rejected in debate as unstable and unworkable—as indeed they were obliged to do by the Constitution itself—and committed themselves to republican government. The democratic sentiment in Congress, that is, the desire that the wishes and expectations of the people might be met, was expressed somewhat loosely by William

[2] Eugene Wambaugh, *Cases on Constitutional Law* (4 vols. 1914–1915), vol. I, p. 24, note.

[3] MacMaster and Stone, *Pennsylvania and the Federal Convention* (1888), pp. 19, 423.

Findley of Pennsylvania, one of the Anti-Federalists who put forward the fifteen proposed amendments, as follows: "The representation ought as nearly as possible to express not only the will, but to participate in the wishes and interests of the people. A large representation embraces these interests more fully, and is more competent to giving and receiving information. The objects of legislation are such as come home to the doors, to the feelings, of every man; the Government ought therefore to secure the confidence of the people by a large representation." [4]

When seeking information from the President of the United States as regards the treaty with Great Britain, the House of Representatives in 1796 debated the question of the nature of the federal government, particularly the system of separation of powers. Frequent references were made to the people as the source of power to justify one organ of government in undoing the work of another, e.g., the President and Senate negotiating treaties which would in effect repeal declarations of war made by Congress. Representative Daniel Buck of Vermont opposed the resolution requesting information on the ground that the treaty-making power was lodged with the President and the Senate, the House of Representatives having nothing whatever to do with it. He conceived the three departments of government as being only three organs through which the will of the people might be made known. "The Constitution is then, emphatically, the expression of the will of the great body of the sovereign people, and while Government moves on conformably to it, we may with the utmost propriety say, that the laws dictated by the will of the people reign, and not men or kings, and this is in the strictest sense of the word self-government, so far as it can apply to a nation; but if we depart from this basis, then may it be said that men reign and not the laws; the will of the people is then abandoned, and the glorious rights for which we have contended, sacrificed and lost." [5] A touch of human interest and pathos was added to the record by Mr. Buck's reference to his military service under General Washington: "Should I give my consent to it [abandonment of sacred rights], the blood which I have shed, and my own mutilated frame, would reproach me." [6] Here the conception of an empire of laws, so highly prized by James Harrington and John Adams, is linked with the doctrine of the separation of powers and the sovereignty of the people. The rule of kings, according

[4] *Annals of Congress* (1791–1793), p. 177.
[5] *Annals of Congress*, Fourth Congress, First Session, p. 431.
[6] *Ibid.*, p. 435.

to Mr. Buck's political philosophy, would be a government of men; whereas the rule of the people is everywhere and always a government of laws.

In a long line of decisions the Supreme Court has marked out the place of the people in the new federal system. Their right to model and remodel forms of government is described as sovereign, original, underived; it is the right of the whole as against a part; it is a right reserved, one which lies quiescent most of the time but can be aroused and made creative at will. The practical effect of the doctrine of popular sovereignty is to dethrone personal and arbitrary power, and in its place to erect as supreme a sort of impersonal and responsible authority.

In the celebrated case of *Marbury v. Madison,* decided in 1803, Chief Justice Marshall built up and elaborated the doctrine of judicial review. He derived the right of the Supreme Court to declare acts of Congress unconstitutional from the nature of the federal government: a government founded upon the will of the people; organized in separate departments; defined and limited in its powers; its acts controlled by an organic law of paramount authority; all necessitating a court competent to declare laws either in agreement with or in contravention of the Constitution. The cornerstone of the decision was the doctrine of popular sovereignty:

> That the people have an original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental; And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.
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> This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may stop here, or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.[7]

Marshall thus establishes an original right of the people to determine their own form of government, a right demanded for them by the Declaration of Independence; and he finds in the people an origi-

[7] *Marbury v. Madison,* I Cranch, 175–6.

nal and supreme will capable of organizing departments, and of defining and limiting powers.

In its preamble the Constitution proclaims to the world that its authority is derived from the people of the United States. This preamble, it is true, adds nothing to the body of rights contained in the instrument itself; it is simply prefatory. But its political theory is just as sound as that of any part of the Constitution, especially since it has been confirmed and validated by a body of no less authority than the Supreme Court itself. To Joseph Story was committed, in 1816, the task of justifying constitutionally the extension of the appellate jurisdiction of the Supreme Court to judgments or decrees of the highest state courts, when the Constitution, laws, and treaties of the United States are drawn in question, and their authority is denied or claims of right under state law conflict with them, as embodied in the Federal Judiciary Act of 1789. It was necessary to establish constitutionally the doctrine of national supremacy, because that is what the framers of the act had in mind. Justice Story proceeded to establish national supremacy by establishing the sovereignty of the people in contradistinction to the sovereignty of the states:

> The Constitution of the United States, was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by "the People of the United States." There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be, that the people had a right to prohibit to the states the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; to make the powers of the state governments, in given cases, subordinate to those of the nation, or to reserve to themselves those sovereign authorities which they might not choose to delegate to either.[8]

Upon this foundation, the right of the people, Justice Story built up a theory of the national state which has never been torn down, even by the disintegrating forces of nullification and secession.

After an interval of sixteen years Chief Justice Marshall was to have occasion to explain more fully his position as regards the source from which the Constitution emanated. The occasion arose in a controversy over the right of Maryland to tax a branch of the Bank of

[8] *Martin v. Hunter's Lessee*, I Wheaton, 323.

the United States, in the case of *McCulloch v. Maryland,* decided in 1819. Marshall picked his way carefully along the thorny path of constitutional interpretation. Denouncing categorically the contention of the counsel for the State of Maryland that the Constitution emanated from the states as sovereign political bodies, he likewise rejected the opposite extreme view that it emanated from the American people *en masse.* He adopted a mediate position, to the effect that the Constitution derived its authority from the people acting in their respective states, through state ratifying conventions. But the conventions were little more than a convenience; they did not represent the state governments; they did not act for the several states in their political, corporate capacity. True, he declared, they met under the authority of the several state legislatures, and to that extent the state sovereignties sanctioned the submission of the Constitution to the people. Marshall distinguished the "more perfect union" from the old Confederation by the fact that the authority of the one was derived directly from the people, whereas the authority of the other was derived from state sovereignties. "The government of the Union, then . . . , is, emphatically, and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit." [9]

Chief Justice Taney is remembered principally for his epoch-making decision in the Dred Scott case of 1857, which reduced slaves to the level of chattels, legally speaking, and declared the Missouri Compromise unconstitutional. In that statement of his opinion he identified "the people of the United States" with "citizens," and described them both as "the body politic who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives." In an earlier decision he had located sovereignty in "the people of the several states." One year after the Dred Scott case was decided he made more precise his thought on the source of political authority in the Union. "The Constitution of the United States," he said, "with all the powers conferred by it on the general government, and surrendered by the states, was the voluntary act of the people of the several states, deliberately done, for their own protection and safety against injustice from one another." [10] It would appear as though Justice Taney had been influenced by the mediate position of John Marshall; both locate sov-

[9] *McCulloch v. Maryland,* 4 Wheaton, 404.
[10] *Ableman v. Booth,* 21 Howard, 524.

ereignty in the people acting within state lines, or as Judge Jameson phrases it—in language that sounds slightly quaint to the present generation—in the people "as discriminated into groups by states."

In the case of *Yick Wo v. Hopkins,* in commenting on the "naked and arbitrary power" exercised by the Board of Supervisors of the County of San Francisco when it prohibited, unless by permission, the establishment or maintenance of laundries in buildings other than those constructed of brick or stone, the Supreme Court laid down some fundamental principles of good government. It characterized the ordinances passed by the Board of Supervisors as arbitrary and unreasonable, discriminatory and illegal. In the course of the opinion there is established a direct and definite relationship between sovereignty of the people and responsible government. "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign power is delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power."[11] Thus the sovereign people appear as the author and source of law; and law serves to mark the bounds and limit the exercise of power.

The rise of political parties gave scope to political theory. At bottom, party lines delimit group and sectional interests, and have at times reflected international relations; but in defense of their respective tenets political parties have not infrequently called to their aid theories of government. The party movement of the Anti-Federalists represented a system of political theory totally different from that of the Federalists, as well as personal and group animosities. The Federalists were committed to stable, well-balanced government, with a strong, energetic executive, and a legislature possessing wide legal competence. Seemingly they could not eradicate from their minds the image of executive prerogative under the crown; and in the Alien and Sedition Laws powers were conferred upon the President that were reminiscent of royal powers in England. While they had no intention of denying that the powers of the federal government, under the Constitution, were enumerated and limited, they ex-

[11] *Yick Wo v. Hopkins,* 118 United States, 369–70.

ercised their ingenuity to extend them as widely as possible by implication and by levying on every phrase that would give latitude to Congress. At times they seemed to go to the very borderline separating governments of delegated and limited powers from those of inherent sovereignty and unlimited competence. On the other hand, the Anti-Federalists put liberty before order and stability, in the scale of political values. They could not forget the principles of the Revolution, kept alive by the French in 1789, just when the forces of reaction were victorious in America. They regarded government as a sort of necessary evil, to be restrained as much as possible, this side of anarchy, in the interest of private rights. They placed emphasis upon the rights reserved to the several states and to the people. They feared a strong executive and governmental usurpation of every kind. They were none too kindly disposed toward the power of the courts to declare laws unconstitutional. Above all, they wished to keep alive the sacred flame of democracy which had burned so brilliantly in the days when governments rested upon the consent of the governed and were kept responsible by the fear of revolution. They would preserve intact the priceless political heritage of government by the people.

In Washington's cabinet the champion of strong government with wide competence was Alexander Hamilton, while the champion of weak government with narrow and limited competence was Thomas Jefferson. Hamilton, it is true, had said some complimentary things about the people as the source of authority, but when the new government got under way he became so engrossed in the task of building up and organizing national power that he had little time to think of the people. Jefferson, on the other hand, was by nature and training a confirmed and consistent democrat. He had proclaimed to the world, in 1776, that all men were created equal. In Virginia he stood resolutely against everything that smacked of inequality and privilege. He opposed the Established Church on the ground that it perpetuated the principle of minority rule. He fought primogeniture as an institution contrary to equality and as a bulwark of landed aristocracy. He favored manhood suffrage. He wished that the slaves might be freed. He fathered public education as a means of building up an intelligent and trained citizenry. Above all, he had a supreme and abiding faith in the people. His sojourn in France at the time of the fall of the *ancien régime,* the overturning of privileged classes and corporations, and the advent of the spirit of liberty, equality, and fraternity, had left an indelible impression upon his character. He was absent from the United States during the period of reaction, and

he did not remain in France long enough to witness the gruesome aftermath of a nation intoxicated with too much liberty. Hence his ideals were not shattered. His democratic faith remained firm, and his hopes for democracy were sheltered from the icy blasts of disillusionment.

Jefferson's political theory is essentially the same as that of John Locke, with a dash of French physiocratism thrown in here and there. Especially is this true of Jefferson's thought on the place of the people in government. He has been unjustly charged with having advocated radicalism to the extent of contending that the people should always be given their way without let or hindrance. But actually Jefferson was conservative in regard to the part which the people should play in the political drama. He held that "while those bodies are in existence to whom the people have delegated the powers of legislation, they alone possess and may exercise those powers; but when they are dissolved by the lopping off of one or more of their branches, the power reverts to the people, who may exercise it to unlimited extent, either assembling together in person, sending deputies, or in any other way they think proper."[12] This is strictly in accord with the *Two Treatises of Government*. The people should be permitted to exercise in person, Jefferson believed, only those functions for which they were fitted, given a certain level of intelligence and a certain amount of training. For example, they might safely be permitted to choose their representatives and to serve on juries. He regarded them as "being unqualified for the management of affairs requiring intelligence above the common level."[13] He had faith in the rule of the majority, but held that it must be a reasonable majority, one bridled by intelligence and even by certain outward restraints, such as written constitutions, separation of powers coupled with checks and balances, elective judgeships, and manhood suffrage, the whole structure sustained by an enlightened public opinion formed by newspapers and institutions of learning. Each department of government should rest upon its own independent foundation; there should be no hierarchy in government, such as that represented by judicial supremacy. Now, all this is a far cry from Rousseau's direct democracy and Turgot's concentration of power in one center—so far, indeed, that it would be a gross perversion of the truth to put Jefferson among the disciples of these men. His theory of government was, in its broad outlines, English rather than French. But he sympathized

[12] *The writings of Thomas Jefferson*, vol. I, p. 443.
[13] *Op. cit.*, vol. X, p. 22.

with the French temper, with the French doctrinaire philosophy concerning the rights of man—liberty, equality, and fraternity—and with the determination of the French nation to rid itself by revolution of all encumbrances in the form of privileged classes and corporations. His political theory *per se* bears some resemblance to that of the Physiocrats, as he himself acknowledged; but his theory of government is as far from the benevolent despotism of the Physiocrats as it is from the direct democracy of Rousseau. In conclusion, then, it may be said that his political philosophy was enriched by his contact with the liberals of France, such men as Condorcet and d'Alambert, and also with certain distinguished Physiocrats, among them Dupont de Nemours; but his theory of governmental organization owes nothing to French sources. Locke and the Levellers meant more to Jefferson, the organizer of governmental powers, than did Rousseau and Turgot. His political bible was the *Two Treatises of Government,* not the *Contrat Social.*

Second only to Thomas Jefferson as a leader of liberal thought in the ranks of the Democratic Republicans—as those who took issue with the Federalists came to be called—stood James Madison of Virginia. He was said to be the best informed man in the Federal Convention. There he trained with those who had caught the spirit of a new nationalism and wished to build a new structure which would house adequately the projected national government. Madison joined the majority in working for a strong, stable, and well-balanced federal system. He even went so far as to express fear that the states might encroach upon the rights and powers of the federal government. But the cataclysmic social upheaval of 1789 in France, the rise of political parties in the United States, and especially his contact with Jefferson, who had just returned from France imbued with the spirit of a new freedom, gave to Madison's political theory a new orientation. He now began to fear, as the work of consolidation born of nationalism got under way, inspired and directed by Hamilton, that the rights of the states and of the people might be in jeopardy. Consequently a new theme now began to emerge as central in his speaking and writing; it was the theme of popular government interpreted in the light of federalism.

Republicanism meant to Madison the rule of the majority, a principle which he found in the idea of compact based upon utility and not deducible from the law of nature. He held that all just powers in free governments were derived from compact. The ultimate source of political authority is the people, and to their care is committed the

sacred trust of guarding their liberties. At one time, during the days of his budding nationalism, Madison had possessed a firm faith in mechanical checks and balances as a means of safeguarding liberty. He regarded the Supreme Court as a sort of final arbiter among contending factions. "Some such tribunal is clearly essential," he said, "to prevent an appeal to the sword and a dissolution of the compact." [14] But when the drift toward consolidation had set in, accelerated by decisions of that selfsame court, and when party feeling had become polarized and intensified, Madison drifted from the old moorings and began to search for checks other than mechanical ones, like the separation of powers. He began to emphasize more and more the restraints of an enlightened public opinion. Citizens must be jealous of their chartered rights, he admonished his fellow-men. Every citizen should constitute himself "a sentinel over the rights of the people; over the authorities of the federal government; and over both the rights and the authorities of the intermediate governments." [15] "Public opinion sets bounds to every government and is the real sovereign in every free one." [16] The boasted liberties of the British Constitution, which John Adams eulogized through long and heavy volumes as the product of balanced government, were, in Madison's theory, the result of public opinion. Forms of government, he held, were but the expression of national will. Internal devices for checking power are at best mechanical; the real controlling force, the veritable sovereign, is what people think and feel. If objective checks are necessary, the states may interpose to restrain any undue exercise of power on the part of the general government, on the ground that the Constitution is a compact and the people are sovereign over their own constitutions.

It is not at all difficult to detect between the lines of Madison's writings a rather well-defined anti-British sentiment. To the Jefferson-Madison school of thought, republican France appeared romantic, glorious in her protest against inequality and oppression, an asylum for liberty and fraternity. Great Britain, on the other hand, they regarded as realistic and monarchical. Madison was pleased to liken American republicanism to the principles of the French Revolution, and he gloried in this resemblance. John Adams, on the other hand, vigorously denied that there was a single point of similarity. Madison echoed faithfully the French theory of liberty as expounded by March-

[14] *Federalist*, No. XXXIX.

[15] *The Writings of James Madison*, edited by Gaillard Hunt (9 vols. 1900–10), vol. VI, p. 82.

[16] *Ibid.*, p. 70.

amont Nedham, whose memory John Adams perpetuated by quoting his works at length in order to refute his arguments. Nedham disposed of the troublesome question of checks by throwing all responsibility back on the people themselves. "The people," he said, "are the best keepers of their own liberties."[17] Obviously Madison was familiar with Nedham's position, which was also the position of Turgot, because in 1792 he posed the question substantially in the words of Nedham, "Who are the best keepers of the people's liberties?", and immediately answered, "The people themselves."[18] Of course, too much importance should not be attached to this verbal similarity, but it gives evidence that Madison had caught, retained, and admired the spirit of French republicanism which was abroad in the world toward the end of the eighteenth century. In fact, Rousseau's *Contrat Social* could not be better summed up than by the words of Nedham and Madison to the effect that the people are the best guardians of their own liberties. In the French archives there is to be found correspondence in French, under date of 1788, which describes many prominent public men of the United States of that day. James Madison is portrayed as learned, wise, moderate, gentle, studious; perhaps more profound than Hamilton, if less brilliant; "an intimate friend of Jefferson and sincerely attached to France."[19]

The difference between the two schools of political thought, the Adams-Hamilton and the Jefferson-Madison, consists essentially in their respective attitudes toward the place and function of the people in free government. The one school suspects that the people are incapable of governing themselves, and therefore need trustees to govern for them; the other has unlimited faith that the people are capable of governing themselves, and that in the last resort they are the best guardians of their own liberties. Let them be enlightened by the dissemination of knowledge, let facilities for the formation of public opinion be provided, and mechanical checks will not be so necessary. This is early American republicanism; in a broad sense, interpreted from the angle of popular rights, it is democracy.

The celebrated Webster-Hayne debate, which took place on the floor of the Senate in 1830, turned on the question of the nature of the Union. The international law theory of the Union, as opposed to the constitutional law theory, will be treated later; at this point it will suffice to set forth the logical implications of that contest as re-

[17] John Adams, *Works*, vol. VI, p. 6.
[18] Madison, *Writings*, vol. VI, p. 120.
[19] Farrand, *op. cit.*, vol. III, p. 237.

gards the sovereignty of the people. Senator Robert Y. Hayne of South Carolina was not disposed to challenge the sovereignty of the people; but he preferred to locate it in the people of the several states. Each state, he thought, remained a sovereign entity under the new compact called the Constitution. The people of each state, therefore, remained sovereign. If the people of the United States could in any way be said to be sovereign, it could be only as an aggregate of sovereign groups. Senator Daniel Webster of Massachusetts took direct issue with that interpretation. Sovereignty, in his theory, was something indivisible, national; it resided in the people as a whole. He interpreted literally the preamble to the Constitution: "It does not even say that it is established by the people of the several States; but it pronounces that it is established by the people of the United States in the aggregate." [20] Webster held that the people acted in their collective capacity. It need scarcely be pointed out that this interpretation diverges somewhat from that of John Marshall in *McCulloch v. Maryland.* Marshall in his reasoning shows evidences of having contemplated, and rejected, this idea of collective sovereignty. Does Webster's argument square with the facts of history? The committee of style changed the form of the preamble from "we the people of the States of New Hampshire, Massachusetts, Rhode Island, etc." to what is now found in the Constitution. Just why they made the change has not been disclosed, but it may have been partly because there was no assurance that all of the states, or even nine of them, would ratify the Constitution; and clearly it would have been most embarrassing to have included in the instrument the names of non-ratifying states.[21] Rhode Island had sent no delegates to the Federal Convention, and there was some reason to believe she would not accept its work. But as favoring Webster's interpretation we may cite Justice Story's opinion in *Martin v. Hunter's Lessee.* The learned judge says nothing about the people acting through state organizations, when he expounds the preamble to the Constitution. By silence, at least, he seems to countenance the view that the people acted as a whole. Moreover, time and events must be reckoned with; new situations must be met; and constitutional interpretations that were entirely adequate to former needs must undergo progressive modification to become adequate to new needs.

The tariff, regarded by the South as an obnoxious and oppressive

[20] Debates in Congress, vol. VI., pt. I, p. 93.

[21] See Max Farrand, *The Framing of the Constitution of the United States* (1913), pp. 190–191.

tax levied upon that section by an unfeeling and mercenary North, the problem of the western lands, and the question of internal improvements, all served to bring out and accentuate sectional lines. The East, if Webster's interpretation is correct, was sincerely desirous of furthering the growth of the rising West by means of aid in the construction of roads and canals, light-houses, and harbors. It regarded the West as an integral part of the nation, and believed that the inter-relation of parts was such that the growth and development of one was bound to promote the prosperity of all. The states constituted one grand community. The conception underlying internal improvements was, therefore, essentially nationalistic. South Carolina, on the other hand, had shown little interest in the development of the West. What would a canal in Ohio mean to her? She had her own peculiar institutions, and it seemed good to her to defend her sectional rights. She wished to be let alone to live her own independent life as a sovereign state, and not be put to the trouble and expense of building up other parts of the country. Her attitude was distinctly colonial in contrast with the national attitude of the East. The sacred union forged in the furnace of the War for Independence had made but little impression on her social life. Senator Hayne's insistence upon state sovereignty, therefore, was only a natural reflection of the economic and social position of his state in the Union.

Webster was an Easterner, but his outlook upon public affairs was broad and comprehensive. His prophetic vision detected the inevitable rise of the West, and his logical mind led him to approve everything that would develop the population and resources of that section and bind it closer to the Atlantic seaboard. Improvements through grants for education and means of communication would be for the common good. His was an organic conception of national life: what benefited one member would contribute directly to the benefit of all. It was this national outlook, supported by broad human sympathies, that found reflection in his constitutional theory of the sovereignty of the people collectively. Webster could not tolerate the sectional theory of state sovereignty and of state interposition as a constitutional remedy for federal usurpation, because to him the Union was national and the government was the people's. "It is, sir, the people's Constitution, the people's Government; made for the people; made by the people; and answerable to the people. The people of the United States have declared that this constitution shall be the supreme law."[22] "We are all agents of the same supreme power, the people. The General Gov-

[22] *Debates in Congress*, vol. VI, pt. I, p. 74.

ernment and the State Governments derive their authority from the same source."[23] He regarded the federal government as the "offspring of the popular will, erected by the people, responsible to the people." In such a conception there could be no place for liberty against the Union; it must be liberty and union, one and inseparable. And it is significant that when the issue between sectionalism and nationalism was finally joined, the one man who was marked by destiny to speak for nationalism reverted to precisely the sentiments expressed by Webster in 1830. Abraham Lincoln, too, conceived of the American Government as belonging to the people. It sprang from their will; it was administered by them; and it existed for their good.

The ablest statesman drafted into the service of the South in its life-and-death struggle against what it was pleased to term "consolidation" was John C. Calhoun of South Carolina. In some respects his political theory was more original and creative than that of any of his predecessors. He struck out in new directions. He broke with the old *Naturrecht* school and had the courage to revert to Aristotle, the fountain-source of political theory, for his organic conception of government and liberty. Of course, the theory of slavery was organic. Free society is highly individualistic, implying liberty of persons and property. Slave society, on the other hand, is paternalistic, founded, not upon individual liberty, but upon social and economic function. The slave needs the master no less than the master needs the slave; each without the other is helpless—so the argument runs. Therefore, both are members of an organic social whole in which they move and have their being, the one in the low orbit of servitude, the other in the high orbit of mastership. Hence it was but natural that Calhoun should abandon the time-honored atomistic philosophy of individualism and commit himself to a more organic philosophy, first taught by the Greeks. His desire to replace the principle of the "numerical majority" by the principle of the "concurrent majority," according to which all interests in the community would have representation, each having a check on the others, furnishes one evidence of his point of view. He exalted the idea of community, with its inter-relation of parts, and subordinated or entirely rejected the idea of isolated individuals, each counting for one in a numerical majority.

Calhoun was quick to perceive the logical implications of Webster's theory of collective sovereignty. He saw that it struck at the very roots of his own theory of nullification. For if sovereignty resided in the people as an aggregate, the Union which rested on the people

[23] *Ibid.*, p. 74.

would by logical necessity be national in character. A unified nation would tend to erect for itself a unified state; it would tend to emphasize national function and national power, and to regard the member-states of a federal system as little more than agents of the general government. The inevitable result would be a drift toward centralization of authority and at the same time an enlargement of the scope of the general government. This was precisely what Calhoun feared and what he thought he detected in the action of the federal government in regard to the tariff and internal improvements. He called it "consolidation" in contradistinction to "federalism," and braced himself to resist it with every talent at his command.

The essence of the consolidating movement, as Calhoun saw it, was the encroachment of the federal government on the reserved rights of the states and of the people. If in some manner the federal government could be confined within the circle of its delegated powers, all would be well; but with perverse insistence it persisted in legislating outside its proper sphere. For example, it had no right to tax the people of the South by laying a tariff on imports to protect Northern manufacturers. Not only was such authority not expressly delegated in the Constitution, but it could not even be derived therefrom by reasonable implication. It was, therefore, just plain usurpation, as unjust as it was oppressive—so ran the argument of Calhoun, speaking for the South generally. No relief was to be expected from the written Constitution, because liberal construction had brushed it aside, making the discretion of the majority in Congress the sole and final arbiter. Nor could protection be found in the Supreme Court, because it was limited to law and equity, and could not adjudicate questions between the federal government and the states that were essentially questions of policy, such as the protective tariff. But one source of relief suggested itself to Calhoun's mind. Each state, he held, possessed the right to interpose its veto on national policies adopted in the form of laws passed by Congress; it could declare them null and void and inoperative within its jurisdiction; and then the federal government would be obliged to call a convention of the states to which the disputed act would be submitted. If the act were upheld by three-fourths of the states, it would be declared constitutional, and the nullifying state would have then to incline before the decision or withdraw from the Union. If, on the other hand, the convention should declare the act of Congress to be beyond its delegated and reasonably implied powers, it would then be declared unconstitutional.

Calhoun was seeking an answer to the question: how can the minor-

ity be given a constitutional check on the will of the majority? Slavery had caused a polarization of interest between North and South, and the unequal strength of the two sections had resulted in the development of a major interest in the North and a minor interest in the South. From a political standpoint, on the basis of the rule of the numerical majority, it was equivalent to the domination of the South by the North. Nullification was the answer which Calhoun gave to his own question. Now in order to justify the right of a state to interpose its veto on the legislation of the federal government, it was necessary to magnify the sovereignty and independence of the individual state. Accordingly Calhoun set himself to prove that the Union was a league of sovereign states and the Constitution a compact. The government, he held, emanated from "the people of the several states, forming distinct political communities, and acting in their separate and sovereign capacity, and not from all the people forming one aggregate political community."[24] In a report prepared for the Committee on Foreign Relations of the Legislature of South Carolina at its session in November, 1831, Calhoun took direct issue with the theory of Webster, and laid down the principles of his own "federal" system. "The Constitution," he said, "is the act of the States, as distinct and separate bodies politic, and not that of the American people as a single community."[25] For proof he cited the preamble to the Constitution, and coupled it with Article VII providing that ratification by nine *states* should be sufficient to establish the Constitution between the states so ratifying the same. This he interpreted to mean that the Constitution was accepted by states, and consequently the Union was the work of the states, rather than of the people of the United States collectively.

The deeper one delves into the theory of the slavery controversy, the more convinced one becomes that political theory is rationalization. It is defense of a given position, of a given set of predilections or interests. Webster's theory of popular sovereignty was national, because his whole outlook was nationalistic. New England had no "peculiar institution" to protect by isolating herself from outside contacts. Calhoun, on the other hand, spoke for a people who were sectional in their outlook. They had their own institutions which they had inherited from the past, and which were part and parcel of their social, economic, and political life. That slave labor was less produc-

[24] *Works of John C. Calhoun*, edited by Richard K. Crallé (6 vols. 1888), vol. VI, p. 60.

[25] *Ibid.*, p. 107.

tive than free labor, and that it lent itself less readily to diversity of industry, did not persuade the South to abandon it. Pride, tradition, belief in the kind of paternalism which slavery necessitated, and, above all, resentment at the presumption of certain elements in the North to dictate the social and economic order of the South, all combined to put the Southerners on their mettle to defend themselves. Calhoun's theory of nullification grew out of the exigencies of the times, or was an adaptation of earlier theories of interposition. It was designed to furnish to the minority a constitutional check on the will of the majority which could be invoked by even one state, and from a logical standpoint it was perhaps the best device that could have been suggested. But it was not acceptable to the North. It assumed that majority rule was wrong; that the Union was a league; that the Constitution was a compact of sovereign states; and that the people of each state were sovereign. The North, with its exuberant nationalism, regarded all this as little more than an attempt to revamp the old Confederation, and rejected it *in toto*. The current of national forces was entirely against Calhoun's logic. A "more perfect union" had been established, and if need be the North would resort to arms to prove that a part of its perfection lay in the right and power to force a recalcitrant minority to conform to the will of the majority.

Disunion and civil war drove men back to an underlying unity of spirit which was struggling for expression. The determination not to allow the South to secede required explanation. Webster's theory of national sovereignty did not suffice, because in the last analysis it was contractual. The Union, according to it, was a sort of social contract of all the people; but it was a contract. The heroic sacrifice of blood and treasure revealed a deeper loyalty than a voluntary association of men for personal or sectional advantage. It was argued that the moral drive back of the Union forces was not contractual in origin. There must be postulated somewhere a moral dynamic springing from a deep source of moral personality. The nation that was struggling for self-expression must be an organic personality, formed in history and continuing in spite of human mutations. It was this form which the post-war nationalism took. It was indebted not a little to German transcendentalism, to biological evolution, as well as to the rise of the historical school. Elisha Mulford, who in his book, *The Nation,* caught and crystallized the spirit of the new nationalism, had studied in Germany and was pleased to acknowledge his debt to Hegel and the German philosophy. It is not always easy to follow his apocalyptic flights to lofty levels of organic unity and moral personality;

but it is clear that he wished to exalt the nation lying back of forms of government, and to find in a country torn by civil war a deeper unity—a something that was the product of historical development, that was independent of paper constitutions, a creative force, a realization of divine will working through humanity. One sentence will reveal how far Mulford had moved from the nationalism of Webster. "The people exist in the unity of a conscious and organic life, and in the continuity of an integral power in history." [26] The idea of contract as the foundation of national existence had been superseded by the idea of organic evolution working through history, under divine providence, objectively realizing freedom and justice. Likewise, Francis Lieber, of German birth, emphasized the organic character of the state. He went back to the Greeks for a conception of civil society in which the individual sustains a vital and necessary relation to the whole of which he is a part. He protested vigorously against the artificial conception of civil society involved in nullification, the idea of state sovereignty and compact. In words reminiscent of Aristotle he could say: "Government was never voted into existence, and the state originates every day anew in the family." [27]

Until late years this theory of the organic unity of national life survived in American political theory, notably in the writings of John W. Burgess. Quite recently, however, it has undergone searching criticism. The World War did something to dispel the mists of metaphysical speculation that hung over the doctrine of sovereignty and nationality. There is now a tendency to regard the state and government, and even the underlying nation, in a more realistic light. Political theory is less apocalyptic. It distrusts abstractions. It is not quite so sure, as were the Fathers, of the purposes of divine providence. It inclines toward a justification of political authority on the ground of public service. The state has rights because it performs certain basic and indispensable functions, such as the maintenance of a régime of law and order wherein security, justice, and social welfare find their place. On this theory the Union is justified by the national functions which it performs—national power to regulate foreign and domestic commerce, to perform treaty stipulations, to develop national credit, to raise national revenues, and to provide for national defense. In the days of nullification and secession those who believed in the concept of nationalism would fight for the Union;

[26] Elisha Mulford, *The Nation* (1872), p. 323.

[27] *Addresses of the Newly-Appointed Professors of Columbia College* (1858), p. 98.

those who believed in the concept of particularism, for the right of secession. That is what actually took place, and the exuberant political speculation which the controversy called out was for the most part little more than rationalization.[28]

III. The State and the Individual

The age-old quest of political theory has been for some sort of equilibrium between the authority of the state and the rights of the individual, an equilibrium that would preserve the force of the one without losing the freedom of the other. Empires have risen and fallen, systems of law have been elaborated and abandoned, yet a perfect reconciliation of authority with liberty is always in the future. Just when opposing forces have come to rest and a seemingly stable equilibrium has been effected, new explosions of state power or of individual liberty disturb the balance and put the solution of the problem back where it was. From this standpoint, therefore, government is little more than an endless series of adjustments and readjustments. The community must be preserved by the establishment of a régime of law in which order, security, justice and social welfare shall find a place. There is a public interest which must always, in case of conflict, take precedence of private interest. This is the realm of authority. But the individual member of the community must have a sphere of immunity from the arbitrary exercise of power, else initiative, personality, and character cannot be developed; and without these qualities in its members the community itself cannot long survive. How, then, are public and private interests to be harmonized? How is state power to be so tempered that it will protect rather than destroy the tender plant of liberty? This is the problem of government.

The student of American government is immediately struck with the complexity of the problem of reconciling authority with liberty by reason of the dual character of law and citizenship in the United States. The majority of American citizens live under two systems of government, have two sets of rights, and are responsible for the discharge of two sets of obligations. By one act a person may commit two offenses for which he may be tried on the same set of facts in two sets of courts, convicted and punished *twice*—not for the same of-

[28] For an illuminating discussion of the type of nationalism which emerged from the Civil War, see Charles E. Merriam, *A History of American Political Theories* (1920), chaps. VII, VIII.

fense, it is true, but for the same act. A highway robbery of the United State mails constitutes two offenses, one punishable by state authorities, the other punishable by federal authorities. The assault of a United States marshal constitutes two offenses punishable in two jurisdictions. The concurrent jurisdiction of the federal and state governments growing out of the Eighteenth Amendment makes it easy to commit two offenses by one act. As there is a dual set of punitive agencies in the American federal system, so there is a dual set of protective agencies, such as constitutions and courts, governmental organizations, intricately balanced and checked, for the purpose of securing the minority against a violation of their rights by a temporary and tyrannical majority. The Federal Constitution limits the powers of both the state and the national governments, but it does not fix beyond dispute the line between the delegated powers of Congress and the reserved powers of the states. Here has been the battleground of contending factions. The slave-holding South charged Congress with having overstepped the bounds of its delegated powers, in that it encroached on powers not surrendered by the states. It was for the purpose of confining Congress within its proper sphere that South Carolina proposed nullification and later passed the ordinance of secession. Unitary governments are not subject to disputes occasioned by friction between two political jurisdictions. Their danger lies in another direction, namely, in so completely subordinating non-sovereign jurisdictions as to leave little room for local liberties. It is better to have some friction, and always to be striving for a more perfect adjustment, combining the strength of unity with the liberty of diversity, than to abandon altogether the federal principle.

The Constitution, as it came from the hands of the framers, contained no bill of rights. That omission, however, did not pass unchallenged. George Mason of Virginia, a staunch protagonist of the rights of the people, objected to the Constitution on the ground that it contained no guarantee of rights, such as freedom of the press, trial by jury, and freedom from standing armies in time of peace. This was serious, he thought, because the declarations of rights in the state constitutions would be rendered nugatory by the supremacy of national law. He thought he saw in the judiciary a mighty engine for the oppression and ruin of the poor by the rich. It was a dark picture of the future that he was minded to paint, full of heavy shadows of impending monarchy or of corrupt and tyrannical aristocracy. So deeply did he feel the imperfections of the Constitution that he refused to sign the document. When the framers were confronted with

their failure to incorporate a bill of rights they pointed out that in the body of the instrument were to be found ample provisions for the protection of private rights; and furthermore, they said, the entire instrument was itself one grand bill of rights. Was it not the people's government? Surely the people needed no protection against themselves. This was a logically perfect reply, but it did not satisfy the liberal element in the states that had been nourished on the doctrine of natural rights and revolution. Accordingly the Constitution was ratified on the condition that when adopted it should be amended in the direction of adequate guarantees of individual liberty and the protection of property. In 1789 Madison drew up nine amendments and laid them before the House of Representatives. In substance they were incorporated in the first ten amendments which were finally made part of the Constitution.

It is not proposed to make at this point a detailed and exhaustive study of the manner in which private rights are protected under the Constitution. Rather it is proposed to give illustrations of how the balance between authority and liberty is maintained in our federal system, by referring to the protection, not only of the rights of individuals, but also of the rights of society. Public as well as private interests need guarding. The state has a life of its own to sustain, and it has reserved to itself the sovereign right of protecting the public health, safety, and morals, as well as providing for the peace, good order, comfort, and convenience of the people, by what is termed the "police power." On the one hand, the individual has a certain sphere of immunity from arbitrary power, secured to him by the Constitution; and, on the other hand, his freedom is limited by rational regulation in the interest of the freedom of all and the general good of the community. The essence of liberty consists in substituting rational for irrational restraint. But some sort of restraint there must be; it will be either the blind and untamed force of individuals, which tends to anarchy, or the restraint of reason embodied in law and administered by the courts. Are the restraints which the Constitution places upon the exercise of power reasonable? Do they strike a just balance between authority and liberty? Do they harmonize in one system of law and government the prerogatives of the state and the rights of the individual? A brief consideration of the protection of private rights under the Constitution will help us to answer these questions.

American political and constitutional theory still finds a place for the natural rights of the individual. During the revolutionary period much was made of the inalienable rights of man as an offset to the

legal omnipotence of Parliament. Less was made of natural rights by the framers of the Constitution. But American judicial interpretation of the Constitution occasionally reverts to the *Naturrecht* philosophy of an earlier period to establish limitations upon legislative and executive power. Such rights are described as natural, fundamental, and reserved when the social compact is entered into. The three outstanding, primordial rights are held to be life, liberty, and property. In a dictum issued as late as 1901 the Supreme Court suggested a distinction between "certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights, which are peculiar to our own system of jurisprudence." In the former class are included freedom of religion, personal liberty, and individual property, freedom of speech and of the press, free access to the courts of justice, due process of law, equal protection of the laws, and immunities from unreasonable searches and seizures, as well as from cruel and unusual punishments. In the latter class the court placed the rights of citizenship and suffrage, and such procedural rights as *habeas corpus* and trial by jury.[29] This distinction is founded upon a difference between the rights of man and the rights of Anglo-Saxons. The one body of rights is natural and universally applicable; it constitutes a sphere of immunity from governmental action. The other body is peculiar to a given type of jurisprudence and may be modified in the face of time and circumstance, as indeed trial by jury has actually been modified by certain states of the Union.

One right listed by the court as natural is that of "due process of law." This right lies at the foundation of all the other rights described, because freedom of religion, individual liberty, property, and freedom of speech and of the press, depend for their guarantee upon legal process. If a process of law is not in accordance with fixed and recognized principles, validated by time and usage, it may deprive persons of their cherished rights, and do so even in the name of justice. Congress has not defined "due process of law," and the courts, recognizing the fundamental character of this right, have been slow in exploring all of its ramifications. Judges have been content to feel their way, delimiting the confines of it as occasion has demanded. In the opinion of Lord Coke, "due process of law" is to be regarded as synonymous with "the law of the land," as used in *Magna Charta*. In England "the law of the land" rests for the most part on ancient principles of the common law, which grew up as a bulwark of private

[29] *Downes v. Bidwell,* 182 United States, 282–83.

rights against executive usurpation. The emergence of the doctrine of parliamentary omnipotence has prevented the restraints of the common law from being legally operative insofar as the legislative branch of the English government is concerned. But in America the principles of the common law embodied in bills of rights operate as a restraint on the power of all three departments, executive, legislative, and judicial. The President in his executive orders is bound by "due process of law" just as truly as Congress and the courts are. Legislation must be "in conformity to the settled maxims of free government." The law of the land is something very different from a special rule; indeed, one of its characteristics is its generality. Webster's definition is familiar: "the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial" so "that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."[30] "Due process of law," therefore, as synonymous with "the law of the land," must accord with the general principles of public justice and private right, upon which all free governments are founded.

The purpose of "due process" is to protect the individual from the arbitrary exercise of power on the part of the government, to confine the executive and the legislative branches within their constitutional limits, and to make sure that the judiciary interprets the laws in accordance with the ancient principles of the common law. It rests upon the assumption that arbitrary, unrestrained power is not law, whether manifested by a monarch or by a multitude. When, therefore, any governmental interference with the rights of persons, of contract, or of property is not founded upon the fundamental principles of distributive justice, handed down from time immemorial and recognized by free governments everywhere as controlling, such interference is meddlesome, oppressive, and unconstitutional. To regulate the hours of labor in trades that are not generally thought to be dangerous or even harmful, is unconstitutional interference with the right of contract. To fix a minimum wage for adult women has been held to be an unnecessary and unreasonable restriction upon the freedom of contract. To regulate professions beyond the extent necessary to protect the public health, safety, and morals, is an arbitrary exercise of power. And the same principle applies to all of the rights protected by the Constitution. The citizen has a right to be free from physical re-

[30] Quoted by Justice Matthews in *Hurtado v. California,* 110 United States, 535–36.

straint, to adopt his chosen calling, to live and work, to follow a vocation, and for that purpose to "enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." [31] The framers of the Constitution were careful to lay the states under disability in regard to the impairment of contractual obligations. One of the complaints against the state revolutionary governments was that they had not been scrupulous in preserving the sanctity of contracts. Stay and tender acts had worked practical confiscation of property. As interpreted by the courts, the restriction laid upon the states to the effect that they should not pass any law impairing the obligation of contracts has had wide ramifications. The constitution of a state has been held to be a law within the meaning of this prohibition. The constitutional limitation extends to contracts in which a state is a party as well as to contracts between individuals. A charter granted to a private corporation is a contract. But impairment of the obligation of contracts by the decision of a state court is not reviewable on that ground by the Supreme Court. The latter is charged with restraining unconstitutional legislation by the states, and not with correcting errors of state courts.

Any executive, legislative, or judicial abridgment of private rights, except according to the forms of law, by due process, is arbitrary, unconstitutional, and inoperative. The framers of the Constitution omitted from the instrument this bulwark of rights. They did, however, specify certain limitations on the power of Congress in favor of individual liberty, to the effect that the writ of *habeas corpus* should not be suspended save in cases of rebellion or invasion, or when required by public safety, and that no bill of attainder or *ex post facto* law should be passed. But it was left to the liberal element in the states which favored a bill of rights to add to the Constitution, by way of amendment, guarantees of individual liberty and the right of property as found in English common law. The Fifth Amendment provides that "No person shall be . . . deprived of life, liberty or property, without due process of law." The states, however, were left unrestricted in this respect until the Fourteenth Amendment wrote into the Constitution the principle that "No state . . . shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The principle of equality before the law was added to the "due process" clause of the Fifth Amendment to guarantee to the

[31] *Allgeyer v. Louisiana*, 165 United States, 589.

negro his rightful place in the jurisprudence of the states. But this has not been strictly construed by the courts. According to the decisions, negroes may be excluded from inns, theaters, railway coaches, and schools without being denied the protection of equal laws.

While it is true that the principle of "due process" does bind all departments of the government, yet it is the peculiar province of the courts to determine in any given case what "due process" is. This gives the courts a certain judicial supremacy. They can hold an executive order to be "without due process of law," and thus in effect nullify it. They can declare acts of the legislature, and even of the people when legislating by the initiative and referendum, to be without due process of law and therefore unconstitutional and inoperative. As Justice Matthews said in the case of *Hurtado v. California,* "The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government."[32] Surely if the guarantee of private rights found in the Constitution of the United States is to mean anything, as against both executive and legislative usurpation, some impartial and detached body of judicial temper must have the right to interpret the organic law of the land and decide if governmental action squares with the law of its own being. If it does not, it must be declared arbitrary and no law at all. Thus the rights of individuals, natural and positive, substantive and procedural, are protected in the Federal Constitution by provisions which are operative as against both state and national governments.

But it is entirely possible to magnify private rights to a point where the force of the state is weakened and even undermined. Carried out logically, natural rights are capable of destroying the state. They represent a sphere of absolute immunity upon which governments cannot, under any circumstances, encroach. Now it may be questioned if there are such immunities as natural rights. What it was possible to regard as a right at one time, and to protect from governmental regulation, may become by a change in social conditions a positive menace to the community, requiring regulation and even repression. When there was little traffic on the roads, there was correspondingly little need of regulation; but with the advent of fast-moving motor-cars and the construction of great arterial highways,

[32] 110 United States, 536.

positive and detailed regulation became imperative. Rights of the road have undergone progressive modification with the progress of invention and the evolution of transportation. The same is true of all phases of human conduct. Rights once considered natural, inalienable, imprescriptible, and inviolable have been taken away by legislative action, and, what is more, the courts have upheld such action as "due process of law." What are usually spoken of as natural rights are only rights of long standing, derived from immemorial custom and usage. But they are not like the laws of the Medes and Persians. Custom can be and is modified by enactment. Caution should be used, it is true, in cutting athwart long-standing custom by legislative prohibition, but when it must be done, it can be done, and by "due process of law."

In the face of the anarchism of natural rights the state has been pushed back upon its right of self-defense. Over against the natural rights of the individual the state has placed the positive rights of the community; over against the individual's right of life, liberty, and property, the state has placed the community's right to peace, order, health, safety, morals, comfort, and convenience. In case of a clash between the two, the rights of the whole must take precedence of the rights of a part. No state can divest itself of the duty to protect its own integrity. Sovereignty connotes a sort of corporate immortality. States cannot legally commit suicide. There is, therefore, inherent in state power, in sovereignty, the authority to oppose and represss every outcropping of anarchism, be it active opposition to the régime of law or be it only extreme individualism pushed to the verge of anarchy. It is now a recognized principle of judicial interpretation that there can be no rights against the public good. Even vested rights may be divested by law if they conflict with the peace, order, and good government of the state, provided, in the case of the states of the American Union, that the obligation of contracts shall not be impaired. The legislative organ which vests rights contrary to the public good acts beyond its competence and so without authority, and courts giving validity to claims founded upon such alleged rights act without due process of law. No government in any or all of its departments can barter away the public health and morals. Thus the "police power" of the state springs directly from the heart of sovereignty. If the state has a right to existence—and that is the meaning of sovereignty—it has also, and on that account, a right to maintain its existence by whatever means are necessary and appropriate thereto. It may use all the legal machinery at its disposal, and

all its state power in addition, to defend its public rights against conflicting claims of private rights.

Some examples of the exercise of the "police power" of the state will make plain to what extent the Constitution of the United States, as interpreted by the courts, maintains an equilibrium between authority and liberty. The doctrine of natural rights tipped the balance arm of the scales far toward individual liberty and private property; the doctrine of the "police power" does something to restore the authority of the state and bring about an equal balance of the scales, which is justice. But first it should be observed that in the Federal Union there is "police power" pertaining to the states, and a like power pertaining to the nation. In its widest ramifications the former includes the right to prescribe regulations in the interest of the health, peace, morals, education, and good order of the people, and to legislate so as to develop the resources of the state, promote its industries, and augment its wealth and prosperity. This is an extensive sweep of authority, and it is safe to say that the major portion of the "police power" in the Union remains with the states. Federal police power is usually derived indirectly from the delegated and enumerated powers of the federal government under the Constitution. Through its power to regulate commerce, to tax, to establish post-offices and post-roads, and to coin money, Congress is able to exercise an internal police power, suppressing obnoxious forms of traffic that would interfere with the liberty of trade, habits of industry, and good morals. Lotteries and obscene printed matter are suppressed through control of the mails. Prohibition under the Eighteenth Amendment is enforced through the exercise of police power. Under the Thirteenth and Fourteenth Amendments, and under the commerce clause, Congress is able to control very narrowly the exercise of state police power. Moreover, by a sort of general sovereignty the United States can insure the peace and order necessary to the performance of its functions.[33]

The police power is a restraint upon liberty, exercised in the interest of all. It lies at the very foundation of organized society. One Mr. Jacobson was proceeded against by criminal complaint in an inferior court of Massachusetts for refusing to comply with a regulation of the Board of Health of Cambridge requiring vaccination. He was found guilty and fined. When the case came to the Supreme Court, Justice Harlan, delivering the opinion, said: "But the liberty secured by the Constitution of the United States to every person within its

[33] See Ernst Freund, *The Police Power* (1904), p. 62 ff.

jurisdiction does not import an absolute right in each person to be, at all times, and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good.''[34] A house falling to decay and constituting a menace to passers-by may be destroyed by order of the state; houses in the path of a fire may be demolished; diseased cattle may be slaughtered; decayed and unwholesome food destroyed; the erection of wooden buildings in cities prohibited. Similarly we have regulation of railroads; compulsory vaccination; quarantine; restraint of vagrants, beggars, and habitual drunkards; suppression of obscene publications; prohibition of gambling houses, saloons, and brothels; and limitation of hours of labor in dangerous trades.[35] These are but a few of the things the state can do under its internal police power. But in every instance there must be unmistakable public interests which need the protection of law; and, furthermore, the means used must not be unreasonable or oppressive. There must be no arbitrary interference with personal liberty and the rights of private property. And the last word on whether or not there has been such interference belongs to the courts and not to the legislature.

In 1848, in the case of the *West River Bridge Co. v. Dix,* it was decided by the Supreme Court that Vermont had a right to extend the public road over a bridge erected and maintained by a private corporation acting under a franchise from the state. The charter of incorporation was held to be a contract, but one that could be superseded by the sovereign right of eminent domain, exercised to protect and promote ''the interests and welfare of the community at large.'' The ground of the decision was that every contract carries an implied condition that enjoyment of rights under its terms shall not conflict with the public good. Such conditions ''are superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur.''[36] Interpreted in this light, the obligation of the state under the franchise of incorporation granted to the West

[34] *Jacobson v. Massachusetts,* 197 United States, 26.
[35] *Lawton v. Steele,* 152 United States, 136.
[36] *West River Bridge Co. v. Dix,* 6 Howard, 532.

River Bridge Company was not impaired. It was a case of taking private property for public use. The bridge franchise was extinguished and the tangible property was taken over and converted into a free public highway, compensation being assessed and awarded. In brief, this case reveals the State of Vermont in the act of asserting its right to existence and expansion, protecting and promoting its public interests and the general welfare of the community. Before that highest right, private property, even in the form of franchises, must give way.

But the police power of the states of the Union is not unlimited. It must be exercised by due process of law; for otherwise it will run afoul of the Fourteenth Amendment as interpreted by the Supreme Court. Nor is the police power of the federal government unlimited. It must be kept within the established confines and be exercised by due process of law, else it will run afoul of the Fifth Amendment. Thus both the state governments and the federal government possess the power of self-defense, but they must justify its use before a tribunal of law. Authority is balanced by liberty. The rights of the individual are guaranteed, while at the same time the rights of society are preserved intact. A written constitution, delegating powers and placing limitations on power, interpreted by the courts, is both a bulwark of liberty and a support to authority. Adequate state and national powers exist for all purposes of government; but they must be employed with due regard for private rights. The American federal system contemplates a dual set of powers and a dual set of checks on power. It does strike a just balance between the individual and the state; between private rights and public authority; between liberty and sovereignty. And it is the function of the Supreme Court, at the apex of the American constitutional system, to maintain permanently this just balance. The Supreme Court is the guardian of the individual citizen against usurpations of power on the part of either the state governments or the federal government; and it is the guardian of both the state and national governments against the anarchism of absolute private rights. In its decisions the doctrine of natural rights does crop out occasionally; but the determination of what shall constitute a natural right is left very largely to its discretion. So it would seem that the ultimate reconciliation of the rights of the individual with the sovereignty of the state in the American system is committed to a body of judges upon whom it devolves to interpret the great charter of American liberties, the Constitution. This charter seeks to preserve to each one his rights of life, liberty, and property,

while at the same time providing for the life and liberty and general welfare of the Great Society.

IV. The Nature of the Union

In no field of political theory has the law of the pendulum been more clearly discernible than in American federalism. Back and forth between confederation and national state, between an international law and a constitutional law conception of the Union, between political pluralism and political monism, the pendulum has swung ceaselessly. Even now it has not come to rest. Shall the states cooperate with the federal government in the enforcement of prohibition laws? Shall they be free to regulate intra-state commerce? To what extent ought the states to aid in the reclamation of arid lands? Shall education in the states, highway construction, or agricultural experimentation, be controlled by the central government through federal grants in aid? At the present moment there seems to be a drift of public opinion away from a highly centralized and omnicompetent general government and toward a decentralized and deconcentrated national administration. Federal unions generally pass through certain fairly well defined stages, beginning with a loose league of colonies or cantons, evolving through a stage of more permanent partnership or confederation, and culminating in a federal union. If the consolidating process proceeds too far, it creates reaction and with it a slight swing back toward decentralization. But after all it is not easy to draw a sharp line of demarcation between confederations and federal unions. It has frequently been remarked that authority in confederations terminates on states in their corporate or collective capacities, whereas in federal unions it terminates on individuals. While in general this is a valid distinction, and one which is made much of in the *Federalist,* it is also worthy of notice that under the Confederation of 1777 the government acted immediately on individuals, as in the cases of capture, piracy, the post office, coins, weights and measures, trade with the Indians, and claims under grants of land of different states, as also in case of trials by courts-martial in the army and navy. "In all these cases," as Madison points out in the *Federalist,* "the powers of the Confederation operate immediately on the persons and interests of individual citizens."[37] But, of course, it is true that in the Confederation state sov-

[37] *Federalist,* No. XL.

ereignties were prominent, and that in its actual functioning, or lack of functioning, it was essentially a league or association of states. As between confederations and federal unions it seems to be a question of emphasis. Switzerland moves along very well under a federal union modeled on the lines of the American Union; and the fact that their system is styled *The Confederation of Switzerland,* does not seem to cause the Swiss any uneasiness.

Types of thinking as regards the nature of the Union might be grouped as follows: (1) the international law theory; (2) the constitutional law theory, and (3) a mediate or compromise theory. According to the first, as its name would indicate, the Union was regarded as a league of sovereign states functioning in their corporate capacities and united by a voluntary agreement known as a compact; it was this type of union that the New Jersey Plan, in the main, was brought forward to support. According to the second theory, the Union was regarded as a national state founded upon the national will of one body politic and held together by an organic law called the Constitution; it was this general conception that the Virginia Plan was put forward to support. The third conception grew out of the necessity of compromise, and is represented by the Constitution itself as it came from the hands of the framers. The latter were unable to institutionalize all the features of either plan and of other plans submitted, but they did the best they could to incorporate the best features of each. What might be called the great paradox of the Constitution is the fact that the most unmistakable national principle in the whole instrument was incorporated from the avowedly "federal" plan of New Jersey. On June 15, 1787, Mr. Paterson of that state laid before the Convention a plan intended to revise, correct, and enlarge the Articles of Confederation so as to render them adequate to the exigencies of the government and the preservation of the Union. It reserved to every state a share of sovereignty, freedom, and independence; but its framers allowed to creep in a consolidating principle that undermined the whole structure. Article 6 reads: "Resolved that all acts of the United States in Congress made by virtue and in pursuance of the powers hereby and by the Articles of Confederation vested in them, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective states so far forth as those acts or treaties shall relate to the said states or their citizens, and that the Judiciary of the several states shall be bound thereby in their decisions, anything in the re-

spective laws of the individual states to the contrary notwithstanding." [38] The nationalists in the Convention were quick to perceive the value of this nationalizing principle and ready to adopt it as the cornerstone of their new edifice. Around its base the currents of political discussion for and against interposition, nullification, and secession swirled tempestuously, but the rock of the Constitution remained unshaken. The Constitution is the supreme law of the land, for states as well as for individual citizens, just as Mr. Paterson proposed that it should be.

It was the rise of political parties, together with the revolutionary philosophy of the French Republic, that polarized thinking on the nature of the Union. The ambition of the Federalists to establish a strong national government with adequate national powers and resources, including means of defense, stirred up a reaction in the minds of those who feared consolidation and a possible disappearance of the states as political bodies. The Anti-Federalists began to focus their attention on state rights, and to demand that the consolidating drift be checked. They magnified the sovereignty and independence of the several states, together with their reserved rights under the Constitution, leaning heavily on the Tenth Amendment. This movement of protest against what was considered to be a nationalization of a strictly federal system came to a head in the Kentucky and Virginia Resolutions of 1798. Without doubt these were intended to be a political broadside against the Federalist Party, especially against its policy of "consolidation," vesting monarchical powers in the hands of the executive, and headed toward a government of unlimited competence. The primary purpose was to create a public sentiment against the administration in office and thus bring about a change, and it is questionable if the resolves were intended to set forth a concrete plan of nullification, such as was to appear later in the South Carolina Ordinance of 1832. The nullifiers of South Carolina drew inspiration from the ideas of Jefferson and Madison as embodied in the Kentucky and Virginia Resolutions and attempted to link together the two movements, but their efforts were not crowned with unqualified success. In their broadsides both Jefferson and Madison laid stress on the compact theory of the Union, on the delegation of definite powers to Congress, coupled with a reservation to the states of powers not delegated. They denied the federal government's right to act as the final and exclusive interpreter of the extent of its own

[38] Farrand, *Records of the Federal Convention*, vol. I, p. 245. (Spelling and capitalization modernized.)

powers, and demanded for each party to the compact the right to decide for itself when the limits of delegated authority were transgressed and the mode of redress. Jefferson revived his whole system of revolutionary philosophy to do duty against a new centralized and nationalist government, namely, the Congress of the Federalist régime. Like Parliament before 1776, Congress was attempting to govern without the consent of the governed, Jefferson declared, arrogating to itself the right to bind the states "in all cases whatsoever." In that event, he held, the states would have to revert to their natural reserved rights and oppose such oppression. The Kentucky Resolutions of 1798, drawn up by Jefferson, were a new declaration of independence directed against the Federalist administration, and a new application of the old doctrine that governments not founded upon consent of the governed might be overthrown. In the second set of Kentucky Resolutions, reaffirming the original position, nullification of state sovereignties was proposed as the remedy against unconstitutional legislation, but there was lacking the concreteness and militant tone of later nullification. Jefferson was making public opinion, whereas Calhoun later was determined to render federal law inoperative in South Carolina. Jefferson was attempting to do no more than restate certain old principles of the revolutionary theory as a warning to the Federalists not to go too far. He had no thought of organizing a revolution, nor even any thought of actually frustrating the operation of federal law in Kentucky. He wished to raise an issue on which to turn out the party in power. Madison, even milder in tone, embodied in the Virginia Resolutions the substance of the Anti-Federalist philosophy. He very definitely forsook the nationalistic philosophy of his earlier days, when he thought the "more perfect union" would have to rest upon the solid foundation of the people, and accepted the doctrine that the Union rested upon a compact to which the states were parties. From a constitutional law theory of the Union he slowly gravitated to an international law theory, due to his contact with Jefferson and the political exigencies of the times. But once again, in his old age, he gave his assent to the nationalistic political philosophy. He had lived through the stormy controversy over nullification in South Carolina and had been repelled by the ugly specter of national disintegration. He saw clearly in 1835, just as he had seen in 1787, that final authority must be lodged in organs of government representing the whole, and not in those representing only a part. Nothing more is needed to vindicate Madison of the charge of nullification than the following quotation:

"A political system which does not contain an effective provision for a peaceable decision of all controversies arising with itself, would be a government in name only. Such a provision is obviously essential; and it is equally obvious that it cannot be either peaceable or effective by making every part an authoritative empire. The final appeal in such cases must be to the authority of the whole, not to the parts separately and independently." [39]

In his debate with Hayne, Webster interpreted the Kentucky and Virginia Resolutions as expressing a revolutionary, rather than a constitutional, right. He held that there could be no constitutional right of interposition. He denied that the Union was a compact between state governments, whereas Hayne, on the other hand, denied that it was a compact between the states and the federal government. Webster conceded that the nature of the Union was contractual, but contended that it was a compact of all the people, not unlike the social compact of the *Naturrecht* school. But as the law of such compacts is the rule of the majority, the minority could not expect to find constitutional means of blocking the will of the majority. All that is open to them is the right of revolution. Hayne's conception of the Union, on the other hand, was strictly international. The Constitution, he thought, was to be regarded as a sort of treaty between sovereign states, of such a nature that in the absence of a common superior each member state would be justified in judging for itself of infractions of the treaty as well as in determining the mode of redress. This would furnish protection to minority interests, and it would also provide for legal and constitutional resistance to unconstitutional acts of Congress. One-fourth of the states could block the action of the other three-fourths, if the amending machinery of the Constitution could be transformed into a legal device for nullification. In the theory of Webster, the Union was indissoluble; in the theory of Hayne, the Union was a convenient association of states for certain definite purposes, modifiable by the parties to the articles of association, and in the last resort dissoluble.

John C. Calhoun subscribed to much the same theory of the Union as did Senator Hayne. He held that the federal government was not a party to the compact. The Union was the result of sovereign states having joined themselves by a compact to which they were all parties. The rule of such an international league is not the majority of votes. Each sovereign state retains a veto on the acts of its agent—in this case, the federal government. Each state reserves the right to pass

[39] Farrand, *Records of the Federal Convention*, vol. III, p. 537.

judgment on the acts of its agent, and to declare them null and void. In fact, the states are *in* the Union only for the purposes expressed in the Constitution; insofar as the reserved powers are concerned, they are *out* of it all the time. So there are vast stretches of state life and activity beyond the pale of the Union.[40] The Union is one of states and not of individuals. The federal government is only an organ of the people's power—that is, the people of the several states. Now it was upon precisely such political philosophy as this that the South Carolina Ordinance of 1832 was predicated. The assumption of the right to declare null and void and to render inoperative a law of the federal government, was necessarily founded on the theory that the Union was a confederacy the members of which were sovereign states. The federal government, in this conception, was only the creature of the states: hence, the sovereign states could not submit their differences with the federal government to the judgment of the Supreme Court, because it was the creature of a government which, in turn, was the offspring of the states. South Carolina opposed her law to federal law; she enjoined her officials to enforce the Ordinance under oath; and she forbade appeals from state courts to the Supreme Court. This was all very far-reaching. It was really an attempt to nullify Article VI, Section 2, of the Constitution providing that the Constitution, laws of the United States, and treaties should be the supreme law of the land, and that judges in every state should be bound to give effect to them. Second, it was an attempt to nullify the Judiciary Act of 1789 permitting appeals from state courts to the Supreme Court when claims of rights under federal law were invoked. Third, it was a bold attempt to nullify certain revenue laws of Congress. It was truly an ambitious program. It went to the roots of the Federal Republic, and cut in two the great tap-root. Changing the figure, the cornerstone which the framers had gladly accepted from Mr. Paterson was rejected by the people of South Carolina.

President Andrew Jackson, in his Proclamation to the People of South Carolina (1832), left no one in doubt concerning his theory of the Union. In the main it coincided with the theory of Webster, although it was perhaps slightly more organic. Jackson fell back on Article VI, Section 2, of the Constitution and denied any constitutional right on the part of a state to resist the enforcement within her jurisdiction of the supreme law of the land. He conceded the right of revolution in extreme cases—not as embodied in the Constitution,

[40] Calhoun, *Works*, vol. VI, p. 98.

but as derived from the natural right of existence; but the power to annul a law of the United States was, he deemed, contrary to both the letter and the spirit of the Constitution, inconsistent with the principles and destructive of the ends for which it was established. "The Constitution of the United States, then, forms a *government,* not a league; and whether it be formed by compact between the States, or in some other manner, its character is the same. It is a Government in which all the people are represented, which operates directly on the people individually, not upon the States; they retain all the power they did not grant. But each State, having expressly parted with so many powers as to constitute, jointly with the other States, a single nation, cannot, from that period, possess any right to secede, because such secession does not break a league, but destroys the unity of a nation."[41] Jackson's conception was preeminently national. He made much of the living unity of the nation. His thought at times rose to heights where a nation might be regarded as an organic being— ". . . any injury to that unity is not only a breach which would result from the contravention of a compact, but it is an offense against the whole Union." The national unity which he prized so highly and was so strongly resolved to defend, had its roots in colonial days, he thought. Before the threat of disunion the President declared that disunion by armed force was treason. In clear and forceful terms he served notice on the nullifiers that the Union would be preserved, even by resort to arms.

The South Carolina Ordinance of Secession of December 20, 1860, was in some respects more logical than her Ordinance of Nullification of November 24, 1832. Nullification was an attempt to find a constitutional remedy within the Union for what the South considered to be grievances. It necessitated the establishment of some form of minority check on the will of the majority. But that was impossible under the Constitution. Legislative power was vested in Congress, and the Constitution made the will of the majority of Congress, when approved by the Executive and not declared unconstitutional by the Supreme Court, the supreme law of the land. There was no way of wriggling around Article VI. Secession, however, involved a dissolution of the bonds which united South Carolina to her sister-states. This she attempted to do formally by repealing the Ordinance of 1799 ratifying the Constitution, together with the ratifications of amendments. But it is in the declaration of the Secession Convention relative to

[41] James D. Richardson, *Messages and Papers of the Presidents* (10 vols. 1896–99), vol. II, p. 648.

the causes which impelled her to secede that the true spirit of the movement is seen. In every line it breathes the spirit of the Declaration of Independence. The same separate and equal station among the nations of the earth is claimed for South Carolina that Jefferson claimed for the thirteen colonies. The Convention put the revolutionary rights of self-government, and the abolishment of governments destructive of certain ends, above the Federal Union; and it added for good measure the law of compact. The North had broken the stipulations of the compact in regard to the return of fugitive slaves, it was urged, and therefore the South was released from all obligation to preserve the Union. The last paragraph of the declaration parallels very closely the Declaration of Independence:

> We, therefore, the people of South Carolina, by our delegates in Convention assembled, appealing to the Supreme Judge of the World for the rectitude of our intentions, have solemnly declared that the Union heretofore existing between this State and the other States of North America, is dissolved; and that the State of South Carolina has resumed her position among the nations of the world, as a separate and independent State; with full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do.[42]

Abraham Lincoln accepted the theory of Webster and Jackson that the Union was one and indissoluble. He differentiated between the violation of a contract by one party and the rescission of a contract requiring the vote of all. He, too, put the beginnings of the Union back in the past, as far as 1774. It had developed by stages and eventually become the "more perfect union" which was now threatened by secession. But if one part has the right to secede, Lincoln was unable to see in what respect the new Union was more perfect than the old Confederation. In his first Inaugural Address on March 4, 1861, he said:

> It follows from these views that no State upon its own mere motion can lawfully get out of the Union; that *resolves* and *ordinances* to that effect are legally void, and that acts of violence within any State or States against the authority of the United States are insurrectionary or revolutionary, according to circumstances.
>
> I, therefore, consider that in view of the Constitution and the laws the

[42] Edward P. Powell, *Nullification and Secession in the United States* (1898), p. 393.

Union is unbroken, and to the extent of my ability I shall take care, as the Constitution itself expressly enjoins upon me, that the laws of the Union be faithfully executed in all the States.[43]

When the Civil War ended, it fell to the lot of the Supreme Court to determine judicially just what had been the legal relation of the seceding states to the Union during the period of the war and before reconstruction was completed. The pivotal decision on this question is to be found in the case of *Texas v. White,* decided by the Supreme Court in 1868, Chief Justice Chase having delivered the opinion of the court. The technical question involved concerned the jurisdiction of the Supreme Court over the State of Texas at the time of the decision, for if Texas was out of the Union by reason of secession or rebellion the court had no jurisdiction, and the suit of the state against White *et al.,* to compel the surrender of United States bonds, would have to be dismissed. The learned judge defined the term *state* as used in the Constitution, and discussed the nature of the Union. He concluded that the Union was an organic thing, grown out of the past, with its roots in common origin, mutual sympathies, and similar interests; that it never was purely artificial or arbitrary. In short, from the beginning it was meant to be perpetual and indissoluble. The states, however, had not lost their identity. One of the objects of the Constitution was to preserve the political integrity of the states, as well as to bind them together in a lasting union. "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."[44] Therefore, Texas' Ordinance of Secession was without legal effect, and the state did not succeed in separating herself from the Union, nor did her citizens cease to be citizens of the Union. Her rights as a member of the Union, and the rights of her citizens, were suspended during the period of the war; but they remained fundamentally inalienable. The government of the state, involved in rebellion, disappeared with the collapse of the Confederacy, and a provisional government was established by the President. All that was necessary, then, to restore Texas to her complete status as a member of the Union was the reestablishment of republican government by amending her constitution and acknowledging her obligations to the Union. That was done by a convention assembled for the purpose, and the State of Texas was restored to her proper constitutional relations.

[43] Richardson, *Messages,* vol. VI, p. 7.
[44] 7 Wallace, 725.

Since the Civil War the tendency in constitutional theory has been to regard the nation in a more organic light than the Fathers were wont to do. Their thinking was to a considerable extent contractual; they were nourished on the contract theory of civil government and individual liberty. But the attempt to establish the liberty of secession for a group of states proved abortive. It plowed a great furrow through the country and disturbed old mechanistic systems of political philosophy. The old political pluralism was at an end. The Confederacy had led to civil strife and bloodshed; consequently a more organic theory of the Federal Union was imperative. Chief Justice Chase seems to have sensed that need, and in the celebrated decision referred to above he grounded the Union on the living organism of the nation. Publicists such as Mulford, Brownson, and Lieber, influenced to a certain extent by German organismic theories, penetrated below the crust of government to the underlying national unity, a thing of the spirit, a sacred union first formed when it was necessary to separate from Great Britain. Badly shattered by economic depression and political reaction during the "critical period," the sacred union suffered eclipse for almost a decade. But at length it partially emerged from the shadow and found embodiment in a new form of government based upon national supremacy. By federal statutes and by judicial interpretation the bonds of the Union were strengthened, until they were put to the almost unbearable strain of the Civil War; but they held fast. The national state had come to stay. No matter what wide oscillations of the pendulum there may be between the idea of an association of states and that of a sovereign state, there is no longer any thought of nullification of secession. Some states may refuse to coöperate with the federal government in the enforcement of certain laws, but that can hardly be termed "nullification." It is a refusal to help, but it is not a deliberate attempt to render such laws null and void and inoperative in certain states. The Union has proved to be in theory, in judicial interpretation, and in fact, indissoluble.

National Prohibition under the Eighteenth Amendment has introduced a radical change in the relations subsisting between the Federal Union and the states. Prior to the adoption of the amendment, Congress had no power to prohibit or even to regulate the manufacture, sale, or transportation of liquors wholly within a state, except possibly in time of war. But the ratification of the Eighteenth Amendment clothed Congress with the same police powers in regard to the liquor traffic that the states themselves possessed. An outcry against

"consolidation" was raised, and fear was expressed that the Union would be destroyed. It was contended that there are implied limitations on the amending process, and that such a radical departure, vesting Congress with control over private conduct, was beyond the contemplation of the men who made the Constitution. But the Supreme Court sustained the constitutionality of the amendment.[45] Congress and the states possess concurrent power to enforce prohibition by appropriate legislation. The states may legislate concerning intoxicating liquors, but they cannot liberalize the terms of the amendment or the existing federal statutes. They can impose more rigorous restrictions on the use of alcoholic liquors, but they cannot enlarge the sphere of rights delimited by Congress. National law controls.

But the crest of the wave of nationalization, with its tendency to centralize authority in the federal government, seems to have been reached, and the tide has begun to recede. The attempts of Congress to regulate child labor in the states, first through the commerce clause, and when the act of 1916 was declared unconstitutional,[46] then through the tax clause, focused public attention on the growing disposition of Congress to enlarge its police powers at the expense of the states. The Child Labor Act of 1919, attempting to tax out of existence a practice which Congress could not strike directly, met the same fate as the earlier law.[47] The Supreme Court blocked the way to federal suppression of child labor, either under the guise of regulating commerce or by imposing a tax on incomes derived from the work of children in mines and factories. Public opinion generally approved the judicial decisions, not necessarily because child labor was regarded leniently, but because it was becoming increasingly clear that Congress was gradually absorbing the police powers of the states. It was felt that, if the process was to continue, the Union would be transformed from a federal republic into a consolidated national state, with one central organ of government, and all else would be reduced to the level of administrative subdivisions. Proof that public opinion was aroused is to be found in the reception which the proposed Child Labor Amendment to the Constitution received. Only four states ratified it. Thus the people said as plainly as they can say anything that they wished to retain the general outlines of the Union sketched by the Fathers, and that the work of centralization had gone far enough. It is true, we have today no Jeffersons or Mad-

[45] *National Prohibition Cases*, 253 United States, 350.
[46] *Hammer v. Dagenhart*, 247 United States, 251.
[47] *Bailey v. Drexel Furniture Co.*, 259 United States, 20.

isons to write for us a revision of the Kentucky and Virginia Resolutions, inveighing against the pretensions of the federal government to exercise plenary power contrary to the Constitution, nor do we need them. The Supreme Court spoke with no uncertain sound; and the voice of the people sustained by a sort of referendum the decisions of their highest tribunal.

READING NOTES

The course of American national development from colonial origins through the Revolutionary period and those momentous years marked by the framing and adoption of the Constitution, logically culminates in the federal system. For the first time in the history of the world the experiment of a federal republic on a large scale has been successfully carried out. But there has been a wide diversity of opinion as regards the nature of the Union. The sources of the interpretation of the federal system are to be found in debates in Congress, in statutes, in decisions of the courts, in writings of publicists, and in custom and usage. The *Annals of Congress* and *Congressional Debates,* printed and published by Gales and Seaton, will be found useful in discovering the mind of those whose task it was to put into operation what the Fathers had planned. A convenient selection of cases on constitutional law is that made by Eugene Wambaugh, published in four volumes, but it needs to be supplemented by later decisions.

Perhaps no one had more to do with molding the lines of the new federal government than John Marshall. His decisions did much to expand the Federal Republic into a national state. The doctrine of judicial review is laid down in *Marbury v. Madison;* the implied powers of Congress are drawn out in *McCulloch v. Maryland;* a judicial construction of the term "obligation of contracts" is made in *Sturges v. Crowinshield;* contracts are defined in *Dartmouth College v. Woodward;* the limitation on states in the matter of obligation of contracts is set forth in *Fletcher v. Peck;* the commerce clause is judicially construed in *Gibbons v. Ogden.* Through these and other decisions Chief Justice Marshall did more than any other man to vitalize the Constitution. See *The Life of John Marshall,* in four volumes, by Albert T. Beveridge, a masterpiece of literature and a tribute worthy of its subject. A much less ambitious work is *The Political and Economic Doctrines of John Marshall* (1914) by John Edward Oster. Professor Charles E. Martin has not overlooked the importance of Marshall's decisions in the development of the American constitutional system, as appears from the space devoted to the life and work of the Chief Justice, in *An Introduction to the Study of the American Constitution,* especially Chapters XIX–XXII. But Marshall only made a beginning. The course of constitutional development must be traced down through the periods of the Civil War, the National Prohibition cases and the Child Labor cases. Gradually the

powers of Congress have been delimited by judicial interpretation. On the power of the Supreme Court to declare laws unconstitutional, see *The Doctrine of Judicial Review* (1914) by Edward S. Corwin, *The American Doctrine of Judicial Supremacy* (1914) by Charles G. Haines, and *Congress, the Constitution, and the Supreme Court* (1925) by Charles Warren.

The rise of political parties and the polarization of interests into major and minor, North and South, divided the theorists into two camps, nationalists and defenders of state rights. Oddly enough, the nationalists, as a political party, were known as "Federalists." See the *Federalist System, 1789–1801* (1906), by John Spencer Bassett. The champions of decentralization and state rights were known as "Democratic Republicans," really Jeffersonians. See *The Jeffersonian System, 1801–1811* (1906), by Edward Channing; also *Economic Origins of Jeffersonian Democracy* (1915), by Charles A. Beard. For an adumbration of nullification and secession, consult the Kentucky and Virginia Resolutions, conveniently reprinted in MacDonald's *Select Documents Illustrative of the History of the United States, 1776–1861* (1907). The writings of Jefferson and of Madison throw additional light on the perplexing problem of the nature of the Union. Jackson's rugged frontier democracy, and his firm stand against disunion, are ably described in *Jacksonian Democracy, 1829–1837* (1906), by William MacDonald. See also *The Reign of Andrew Jackson* (1919), by Frederic A. Ogg, and *The Life of Andrew Jackson,* in two volumes (1911), by John Spencer Bassett. The report of the celebrated Webster-Hayne debate may be found in *Congressional Debates* (1830). Calhoun's theory of the Union, together with his organic theory of the state, is easily traced in the *Works of John C. Calhoun,* edited by Richard K. Crallé (6 vols. 1888). See also "The Poiltical Philosophy of John C. Calhoun," by Charles E. Merriam, in *Studies in Southern History and Politics* (1914).

A more organic union emerged from the ashes of the Civil War. The unity of national life and the indivisibility of sovereignty were emphasized to the exclusion of contractual ideas of government. For this new nationalism, consult the *Manual of Political Ethics* (1839), and *Civil Liberty and Self-Government* (1853), both by Francis Lieber; also *The American Republic* (1866), by O. A. Brownson, and *The Nation* (1870), by Elisha Mulford. The historical and providential constitution lying back of the instrument of government they ranked first in importance and in creative power. Judge Jameson, Theodore Woolsey, and John W. Burgess came under the influence of these post-war nationalists, as appears from the organic theory of sovereignty which they espouse. Thus slowly the Federal Republic, outlined by its founders in 1787, has been filled in by judicial interpretation, partly strife, civil war, usage and custom, and has evolved into an organic national state, with a strong central government and a fundamental law which is supreme.

PART II

THE GOVERNMENT AND POLITICS OF THE UNITED STATES

CHAPTER V

AMERICAN FUNDAMENTAL LAWS

I. The American Federal Constitution

Precursors of the Constitution.—A constitution of government is not the growth of a day. It springs not only from the political theory of the people who make it, which governs its spirit, but also from their political, social, and economic needs, past and present, which fix its form and determine its application. The theory and fact of political and constitutional life have developed simultaneously. The late Professor William A. Dunning of Columbia University, one of America's foremost authorities on political theory, repeatedly declared that the fact of political life always preceded the theory. He said, further, that people determine their political action according to their needs, whims, caprices, and desires, and then seek a theory which will explain and, if necessary, justify it. Hence, if there is any real distinction between political theory and political behavior, the former grows out of and follows the latter. Thus in the case of the American Constitution the spirit and the practical operation of the instrument are inseparably linked together; and while for purposes of explanation and discussion it is often necessary to separate them, the fact should be borne in mind that this is merely an artificial measure designed to further an understanding of American fundamental law. A constitution may be a written document which sets forth definitely the rules for the exercise of sovereign power; as such, it may define the rights and duties of government, distribute the powers, and describe the mode of their exercise. The Constitution of the United States is of this type, and, in the words of Gladstone, is "the most wonderful work ever struck off at a given moment by the hand and purpose of man." A constitution may also be grounded in custom, and may therefore lack the rigidity and the form of a written instrument. This has the advantage of an elasticity due to an easier mode of amendment which is not found in the case of written constitutions. The British Constitution is of this type, and Gladstone gives it a place of primacy among the fundamental laws of its class. But no constitution, whether written or

unwritten, rigid or elastic, difficult or easy of amendment, can be considered apart from the past. The first scientific treatise on the science of politics was written by the famous Greek philosopher, Aristotle; but unknown generations of political and social conduct preceded his work. Today many writers on government advert to Aristotelian principles, and states in working out practical schemes of administration often adopt his views. From the standpoint of basic public concepts, no political writings from his day to this have improved upon his *Politics*. Therefore, in considering the Constitution of the United States we must briefly examine the past in order to discover its foundations and to understand its basic principles.

The first experiments in government in this country were introduced from England. There was a logical transplantation of political ideas from England to the colonies, and from the colonies to the new state. The forerunner of the American constitutional system was the British constitutional system. The cornerstone of the British government was the doctrine of royal prerogative. The prerogatives of the crown were then, as they are now, the sources of political authority in England, and by the same token they were the original sources of political authority in this country. The leading prerogatives concerned legislation, taxation, the judiciary, and administration. The king had large powers of ordinance, including the power of veto and the right to dissolve the legislature. His taxing powers were retained until the Revolution of 1688. In judicial matters the king had extraordinary influence. He appointed all the judges and shared in judicial power. The Star Chamber Court was the court of the crown. In the field of administration the royal prerogative was practically absolute. These prerogatives, excepting that of taxation, were claimed by the king's representative in each colony, namely, the governor. British constitutional control was therefore rigidly exercised in the colonies. Appeals were made to the King in Council. A circuitous process requiring that laws be sent to the Board of Trade, then to the crown's law officers, returned to the Board of Trade, and then to the Privy Council, complicated this almost unlimited power of veto. The inherent right of appeal from the colonial courts to the King in Council was assumed. Parliament decreed that all laws and customs in the colonies that conflicted with the laws of England dealing with colonial affairs should be null and void. It was also enacted that the crown and parliament of Great Britain might pass laws binding upon the American colonies in every respect. Parliamentary control over the fiscal system was exercised in 1763 when colonial laws au-

thorizing paper money, extending the life of outstanding bills, or bills of credit, were nullified. The governor, in pursuance of the king's prerogative, could dismiss members of the council and could veto bills of the provincial legislatures; he could also appoint provincial officers, and in some cases could constitute the courts. Trade, both foreign and intercolonial, was regulated by parliament. Positive parliamentary regulations were binding on the colonial governments, and commercial laws in conflict with British legislative policy were annulled. Colonial trade was a British monopoly. The idea of the corporation, introduced into America by the first charters, has profoundly influenced American institutions. It was, of course, a creature of the crown. Feudal arrangements were also introduced from England into the colonial system through the subjection of certain classes which was legally provided for in the charters or laws of parliament. The constitutional system of the colonies was in a sense a reflection of British institutions, although many of their political practices were the result of experience.

Certain interesting experiments in colonial confederation preceded the Constitution. The first of these was the celebrated New England Confederation of 1643. The colonies feared both their isolation from the mother-country and their own lack of strength. The ambitions of the Dutch, then settled in New York, roused them to the possibilities of a colonial conflict. They also feared a general uprising of the Indians. The protection of trade and defense were, therefore, the leading motives for the union. Akin to these was the desire for a certain intercolonial English solidarity. The delegates assembled in Boston in 1643, representing New Haven, Connecticut, Plymouth, and Massachusetts Bay, were empowered, except in the case of Plymouth, to draft and sign articles of confederation. The Plymouth delegates were not authorized to give final consent, for the articles had to be referred to the voters of Plymouth for ratification. The title of their instrument was the "Articles of Confederation of the New England Colonies." Each colony was authorized to elect two delegates to a general legislature which would meet yearly, to designate its chairman, and to proceed with its legislative business. It was authorized to decide on peace or war, to pass laws for the regulation and protection of the colonies, to consider all matters falling within the proper sphere of a confederation, to levy taxes for the purpose of defraying the expenses of a war, and to levy for additional troops when the emergency required a number in excess of the quota provided by the articles. It also recognized the sovereignty of the subscribing colonies,

prevented the union of two members of the Confederation, forbade the admission of other colonies without unanimous consent, recognized the superiority of the powers of the Confederation to those of any component part, provided for the extradition of criminals, and admitted no authority superior to its own.

The next important plan of union came from William Penn, the proprietary of Pennsylvania. While the plan bears his name, it was an expression of what many colonial leaders were thinking about at the time. It was first suggested to the Lords of Trade and Plantations in 1679. Penn had in mind a union of Boston, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Maryland, Virginia, and Carolina. The plan was clearly based upon royal and colonial coöperation. Each colony was to send yearly to New York two representatives, who collectively would constitute the assembly, over which a commissioner appointed by the crown was to preside. The function of the assembly would be to have jurisdiction over debtors leaving one colony for another, to apprehend and return fugitives from justice, to prevent and cure injuries to intercolonial commerce, and to consider the ways and means of supporting the union and protecting it against the common enemy. The king's commissioner might, during war, levy for troops, and should be the commander-in-chief of the army. The assembly, through discussion and compromise, was to iron out the prevailing intercolonial difficulties as to jurisdiction and trade. The deputies were to have power to devise methods for the support of the union and for its protection against any common enemy. Certain executive and judicial duties would be impossible.

A third plan of general interest was that proposed by Benjamin Franklin in the year 1754, and commonly known as the Albany Plan. Various representatives from the colonies met at Albany in that year, just before the outbreak of the French and Indian War, with a view to providing means of defense against France and the Indians. Of the twenty-five delegates Franklin was by far the most influential. Like the others, his plan conceived a union of colonies and not the creation of a greater sovereign power. A president-general was to be appointed by the crown. A general council, the members of which were to be elected by the colonial assemblies for a three-year term, was to meet annually at Philadelphia. Representation was to be based on the tax contribution of each colony to the central government, with the proviso that no colony should have less than two members. The approval of the president-general was required to make a law

effective. The royal veto might be exercised within three years following the signature of the president-general. All colonial acts were to be submitted to the King in Council for approval. While these plans did not make remarkable headway, yet they represent the basic motives for union, and in them are to be found some of the fundamental principles which eventually appear in the Constitution of the United States.

The Articles of Confederation.—The American Revolution was a great political movement, the purpose of which was to gain American independence. It was justified and explained by that remarkable document "The Declaration of Independence." The political theories and doctrines contributing to the independence movement are described elsewhere in this book. The institutions of the Revolution were extra-legal and extra-constitutional. These institutions, beginning with the local committees of correspondence, soon spread abroad and finally embraced the thirteen revolting colonies. The First Continental Congress of 1774 was an extra-legal association composed of delegates chosen by revolutionary agencies, which varied in the different colonies. This Congress, the first nation-wide manifestation of revolution, paved the way to the establishment of the new state. A non-importation act was passed. The election of committees of enforcement by those qualified to vote for members of the legislature was arranged. A test of loyalty was imposed and an enforcement committee was appointed to carry these laws into effect. The Second Continental Congress of the next year was organized in practically the same manner. Authority was immediately assumed and the acts of a sovereign body were performed. The members proceeded to organize the government of the United States, to prosecute the war against England, to exercise powers of sovereignty, and to frame articles of union. We are not interested primarily in the *de facto* contributions of these revolutionary institutions, but more especially in the articles of union which were eventually adopted under the title "Articles of Confederation."

The organization of the government under the Articles of Confederation was a simple affair. The arrangements included a Congress which was to consist of not more than seven, or less than two, delegates from each state. Each state was given equal voting power. It is interesting to note that the states were given the right to recall their delegates. No permanent executive was arranged for; the President of the Congress merely presided over the meetings of that body and represented the country ceremonially. When the Congress was not in

session, authority was conferred upon a committee composed of one delegate from each state. No provision was made for the exercise of judicial power except in matters of admiralty. Certain limitations were prescribed for the state governments. Only the Congress could make treaties and declare war. Only by the consent of the Congress with the ratification of the state legislatures could a change in the Articles of Confederation be effected. Moreover, each state retained its "sovereignty, freedom, and independence, and every power, jurisdiction and right" not granted to the United States. The inadequacies of the Articles of Confederation were evidenced chiefly in regard to the raising of revenues, the payment of debts due the British, the fiscal system, and the maintenance of public order. Revenues were to be raised by a system of requisitions on the states in proportion to the value of their lands. Such a measure was not adapted to the raising of revenues sufficient to maintain the necessary powers of government. So impoverished, indeed, was the national treasury that the officers and privates who had served in the Revolutionary War went unpaid. The British government refused to evacute northwestern posts until the debts owed to British merchants had been settled. British trade was limited to British ships. Northern merchants were denied British credit and the northern fur trade was ruined. The southern states sought either to avoid these debts or to postpone payment of them. The northern states, therefore, favored a government which would provide for the enforcement of foreign debts through court action. The monetary system was in a disordered condition. The prevalence of foreign coins was explained by the scarcity of specie, due to the Revolutionary War and also to the British demand for payment in specie. Thus the country was drained of its coins. Debts were suspended during the war, especially in regard to soldiers. After the conclusion of peace many lawsuits were pressed against debtors, and a cry was raised for paper money. Seven of the states, acting independently, issued paper money unsupported by specie. Even the government of the Confederation issued large quantities of paper money, ranging from $6,000,000 in 1775 to $140,000,000 in 1779. Furthermore, the public debt was increasing by leaps and bounds, with the result that creditors were not getting their interest. The total debt amounted to $70,000,000, with $10,000,000 owing abroad. Much of the government paper had been acquired by American citizens. In 1789 the arrears on the domestic debt was $10,400,000, and on the foreign debt, $1,640,000. The merchants and creditors naturally wanted a government with power to regulate fiscal matters. Speculators re-

ceiving certificates from the hands of small holders also desired a change. A number of *bona fide* holders of government securities sympathized with the idea of an ordered fiscal system. Some of the leaders, including Hamilton, King, Morris, and others, irrespective of their personal interests, favored a change for the sake of establishing a sound fiscal policy.

Debts and paper money produced numerous controversies in the several states; and in Massachusetts, where there were many private debts and a tremendous state debt contracted for the prosecution of the war, the situation resulted in open rebellion. Daniel Shays, an army captain during the Revolutionary War, organized against the state government a movement of protest against heavy taxes, the cost of legal proceedings, the refusal of the legislature to issue paper money, mortgage foreclosures by creditors against financially encumbered farmers, and the scheme of representation in the Massachusetts senate based upon the amount of taxes paid. But the financial aspects of Shays' Rebellion, while important, were not so significant as was the helpless condition of the state governments which was then revealed. It was clearly shown that violence beyond the control of a state government would require the intervention of the United States to preserve peace and order.

In 1781, 1783, and 1786 attempts were made to amend the Articles of Confederation. These proposals had to do with the levying and collection of taxes, and the failure to amend proved conclusively that the states would not provide the means to meet the public debt. By this time the defects of the Articles of Confederation stood out in bold relief. The more important of them were: the lack of an executive and judicial system; the failure of the state governments to meet the interest and principal of the public debt; the lack of effective control of interstate and foreign commerce; the failure of the government of the Confederation to enforce treaties with foreign governments; its inability to collect taxes; its absolute reliance upon the state governments to enforce its laws; the lack of national authority to act directly against an individual instead of through the state governments in the enforcement of laws; the need of a powerful national government to aid the states in dealing with situations beyond their control; and the ignoring of population as a basis for representation. The reorganization of the government was urged by those statesmen who had had large experience in war, diplomacy, and administration. As early as 1780 Hamilton proposed the writing of a new instrument based upon effective principles of government. Washington called

the attention of the state governors to the fact that the Union could not survive unless supreme power were located somewhere to regulate the general concerns of the Confederation. In 1785 the Massachusetts legislature authorized the governor to call a national convention which would have as its object the enlargement of national authority. In 1786 the Virginia legislature invited delegates from the states to meet at Annapolis to discuss common problems of commerce and taxation. Only five states accepted the invitation, but this was a good beginning. Hamilton suggested that a convention be held at Philadelphia in 1787 for the purpose of considering the Articles of Confederation and suggesting the necessary changes which would meet the primary needs of the Union.

The "More Perfect Union."—In February, 1787, the Congress of the Confederation issued a call for a convention to be held for the sole and express purpose of revising the Articles of Confederation. Such altered and additional provisions as would be required to render the articles more adequate for the preservation of the Union were to be referred to the Congress for concurrence, and then to the states for confirmation. All of the states save Rhode Island sent delegates, and fifty-five of the sixty-five elected delegates attended the convention. Never before had there been an assembly of such able men so widely diverse in training, experience, and point of view. Most of them had performed distinguished patriotic services, while many of them had had practical experience in politics. James Madison, often called the "Father of the Constitution," and later to become its great expounder, was present. James Wilson and Alexander Hamilton, together with Madison, were most prolific in political ideas. The field of finance was represented by Robert Morris, who was known as the financier of the Revolution, and Alexander Hamilton, whose financial measures have dominated the country during its entire constitutional life. The field of diplomacy was adequately represented by Benjamin Franklin. George Washington, the "Father of his Country," was an appropriate representative for war and administration. The legal profession found its most distinguished representation in James Wilson of Pennsylvania, who was the ablest lawyer of the Convention, and later became Associate Justice of the Supreme Court. Three of the members had served in the Stamp Act Congress, eight had signed the Declaration of Independence, twelve had served in the Continental Congress, four (including Washington and Hamilton) had been army officers in the Revolutionary War, and seven had served as state governors. Colonial and state politics and administration had

claimed the services of many. Additional distinctions awaited several of the members in state and national service. Patrick Henry, Thomas Paine, Samuel Adams, and Thomas Jefferson did not attend. Benjamin Franklin enjoyed the distinction of having signed four great documents of the revolutionary and reconstruction periods, namely, the Declaration of Independence, the Treaties of Alliance and Commerce with France in 1778, the Treaty of Peace with Great Britain, and the Constitution of the United States. From the standpoint of economic interests, forty were holders of public securities (depreciated treasury bonds), twenty-four were capitalists, fifteen were slave-owners, fourteen were dealers in real estate, and eleven were engaged in commercial pursuits. Most of them were college graduates. Professions and occupations were represented as follows: thirty-three lawyers, eight businessmen, six planters, one educator, one physician, two men engaged in the public service, and three without special occupation.

The opening session of the Federal Convention took place in Philadelphia on May 14, 1787. As a majority of the states were not represented, the members adjourned until May 25. On that day, on a motion of Robert Morris of Pennsylvania, George Washington was unanimously elected President of the Convention, and was conducted to the chair by Robert Morris and John Rutledge. The President then suggested that a secretary should be chosen to report the proceedings and actions of the Convention, whereupon William Jackson was elected Secretary. The credentials of the delegates were produced and read. A committee composed of Messrs. Wythe, Hamilton, and Pinckney was appointed to draw up the rules of the Convention. The organization and procedure of the Convention were simple. The method of balloting was a fair example of this simplicity. It was agreed that seven states should constitute a quorum, that each state should have one vote, and that a majority vote of the states should be required to decide all questions. Meetings were held behind closed doors and the proceedings were secret, in order to give an opportunity for full and frank discussion of the problems before the Convention. From May 14 to June 13 the Committee of the Whole considered the Randolph Plan; from June 14 to June 19 the Paterson and Hamilton Plans were discussed, and from June 19 to July 26 the debate on the Randolph Plan was resumed. A Committee of Detail was appointed on July 24, and its resolution was referred on July 26. From August 6 to September 10 the Convention debated the plan of the Committee of Detail. A Committee of Style was appointed, charged with the re-

sponsibility of putting the compromises and conclusions of the Convention into definite form. From September 12 to 17 the Convention debated the plan of the Committee of Style.

Various plans were proposed for the organization of a government. One of them has been ascribed to Peletiah Webster, who in 1791 asserted that the Convention had merely taken and copied his own scheme of government. There is little evidence to justify this claim, as Webster was merely thinking along the same lines as many other leaders. The Virginia Resolutions were presented by Edmund Randolph, who defended them before the Convention on May 29, 1787. This plan, in brief, provided for a national executive chosen by the national legislature and ineligible for reëlection; a national legislature of two branches, the lower house to be chosen by the people, and the upper house by the lower house from a list of persons nominated by the state legislatures; and a national judiciary, chosen by the national legislature and with a limited jurisdiction, which should have the right to try cases of impeachment and conduct suits to which foreigners were parties. The powers of the legislature were to be broad, and not enumerated or delegated. Indeed, it was provided that the right to legislate should extend to all cases where the states would be incompetent or where the general interest would demand. The Congress should be vested with a power of veto over the acts of the state legislatures, and might call out the militia against the states to compel obedience. A Council of Revision composed of the executive and a convenient number of the judiciary should consider each act of the Congress before it might enter into effect. Amendments to the instrument were to be submitted to the states for ratification. The provisions of the so-called "articles of union" should be binding upon and enforced by the officials of the state. In support of this plan Randolph observed that in revising the federal system the Convention should inquire into the properties which such a government ought to possess, the defects of the Confederation, the dangers of the present situation, and the remedy. As to the character of such a government, it should offer security against foreign invasion, and against dissensions between members of the union or seditions in particular states. It should procure to the several states various blessings of which an isolated situation was incapable, and should be paramount to the state constitutions. As to the defects of the Confederation, Randolph declared that it provided no security against foreign invasion, that the general government could not check quarrels between states or put down a rebellion in any; that there were many advantages in a union

stronger than the Confederation; in particular, the Confederation could not defend itself against encroachments from the states, and it was not paramount to the state constitutions, even though ratified by the states themselves. As to the dangers of the situation, he adverted to the prospect of anarchy arising from the laxity of government everywhere as an impetus to the formation of a more perfect union. As to the remedy, he declared that its basis should be the republican principle, in support of which he submitted the foregoing resolutions.

On May 29, 1787, Charles Pinckney laid before the Convention the draft of a federal government which he had prepared. According to Madison's notes on the Convention, the Pinckney Plan was ordered referred to the Committee of the Whole which was appointed to consider the nature of the union, but nothing more was heard of it. Mr. Pinckney later pointed out, in a letter to John Quincy Adams, that his plan was substantially the one adopted by the Convention. Professor Andrew C. McLaughlin discovered the Pinckney Plan among the Wilson papers and in the handwriting of James Wilson. According to its provisions, the United States was to be a confederation of free and independent states united for common benefit and for common security and defense. A Congress was to be composed of a Senate and a House of Delegates. The House of Delegates was to consist of one member for every one thousand inhabitants, including three-fifths of the negro population. The members of the Senate were to be elected from four districts and to serve four years, and were to be elected by the House of Delegates either from among themselves or from among the people at large. The Senate and House of Delegates should in joint session choose a President from among themselves or from the people. The executive authority was to be vested in the President. A Council of Revision should consist of the President and the Secretaries of Foreign Affairs and War, and the heads of the treasury and admiralty departments, or any two of them, acting with the President. This plan embodied a number of the provisions of other plans. The claim of Pinckney seems hardly valid, since his plan contained provisions which were introduced by way of compromise after long debate.

The New Jersey Resolutions were presented by William Paterson. They provided for a revision of the Articles of Confederation and an enlargement of the powers of the Congress, to include the negotiation of treaties, the issuing and collecting of requisitions, the taxing of imports, the establishment of a plural executive and of a judiciary appointed by the executive. Treaties and acts of the Congress were

to be the supreme law of the land, in spite of any conflicting state legislation. Provision was made for the admission of new states, the extradition of criminals, and the enactment of uniform naturalization laws. On June 16, 1787, Mr. Paterson defended his plan before the Committee of the Whole. He declared that it accorded with the powers of the Convention and with the sentiments of the people. If the confederacy was radically wrong, he urged that the delegates return to their states and obtain larger powers, and not assume them of their own accord. His own sentiments were beside the point, as he came to reflect the sentiments of his constituents. "Our object," he said, "is not such a government as may be best in itself, but such a one as our constituents have authorized us to prepare and as they will approve. All states standing on the footing of equal sovereignty must concur before any can be bound. As a federal compact actually exists, equal sovereignty is its basis." He pointed out that the Articles of Confederation gave each state a vote and that there could be no alteration without unanimous consent. Such was the nature of all treaties. What was unanimously done, he said, would be unanimously undone. Accordingly he argued against the Randolph Plan and in favor of his own, as it would not vary from the idea of equal sovereignty. The New Jersey Plan, therefore, would divide executive authority among several men chosen by the Congress, and would continue in effect the equal voting power of the states.

An interesting plan was presented by Alexander Hamilton; it was extremely democratic at the bottom, but it became increasingly autocratic as the top of the governmental structure was approached. He had provided for universal manhood suffrage and for a lower house of the legislature to be elected by all free citizens; but there he stopped. A Senate was to be chosen for life by electors chosen by the voters. The senatorial electors should be owners of land. The executive was to be chosen for life by electors chosen by the people. Federal judges were to be appointed, and were to remain in office during good behavior. The state governors were to be appointed by the national government. The Congress should have power to pass all laws necessary for the common defense and the general welfare. The Senate should have the sole power of declaring war. In this way Hamilton sought to weaken the powers of the electorate and of the lower house, and to provide a form of democracy without the dangers which ordinarily attend popular institutions of government. On June 18, 1787, Hamilton delivered his sentiments to the Federal Convention. He pointed out that no amendment of the Articles of Confederation could

answer the purpose of good government so long as state sovereignties continued to exist, and he doubted whether a national government on the lines of the Virginia Plan could be made effectual. He declared the federal government to be an association of several independent states fused into one. He doubted the efficacy of either the Virginia Plan or the New Jersey Plan, and further doubted whether a more energetic government would appeal to the country. In discussing the general basis of good government, he observed that such a government ought to be consistent and to contain an active principle, and that it should have utility and necessity, and a habitual sense of obligation, force, and influence. Different societies, he observed, all have different views and interests, and always prefer local to general concerns. Something should be done, therefore, to provide a general attachment to the national government which would outweigh the allegiance of the states. By force, he meant the coercion of law and the coercion of arms; by influence, he meant the weight of support which such a government would receive from those who would find it advantageous to sustain a government intended to preserve the peace and happiness of the community as a whole. Neither of the plans presented, he argued, would offer the means to counteract such influence. The national government could not exist when opposed by such a weighty rival. The only answer, therefore, was a form of government which would eliminate the rival altogether and transfer the separate sovereignties under the Confederation into a single sovereignty under a general government, with powers adequate to preserve the nation and yet maintain the republican principle. Hamilton confessed that both his plan and the Virginia Plan were very remote from the idea of the people. The New Jersey Plan was nearest to their expectations, he believed, but the people were tiring of an "excess of democracy." He described the Virginia Plan as but "pork still, with a little change of the sauce."

Issues of the Constitutional Convention. One of the outstanding questions of the Constitutional Convention was whether there should be established a direct or a representative system of government. Direct government meant to the Convention such a government as existed in ancient Greece, and was looked upon as the most odious form. A remedy was seen in representative government. James Madison was perhaps the greatest advocate of the principle of representation. The object of government, he said, was to protect the exercise of faculties for acquiring property. Variations in these faculties of acquisition resulted in differences in the amount and kinds of property,

which likewise produced opinions and sentiments resulting in parties. The unequal distribution of property produced factions which, since they could not be removed, had to be controlled. The object of their endeavors was both to prevent majority rule and to preserve the spirit, system, and form of popular government. The solution was representative as opposed to direct government.

Another problem of the Convention was created by the fear of majority rule. The framers of the Constitution were afraid of democracy, and of the rule of the masses. How could majority rule be checked? The election of any branch of the Congress by the people was feared as a reversion to majority rule. James Madison, the philosopher of the Convention, thought that the election of the lower house by the people might break the power of the state legislatures. Gouverneur Morris regarded the Senate as a check. Representation in the Senate, he thought, should be based upon a propertied interest and an aristocratic spirit; and the interests of the poor and the rich should be consolidated in separate houses to provide a check one upon the other. In the minds of these men majority rule meant domination of the propertied class by those who owned no property, and an irreconcilable conflict between the two would result unless it were checked by fundamental law. Accordingly it was suggested that the participation of the people in the government should be reduced as much as possible without causing too much dissatisfaction. Another proposal was that the upper branches of the government should be so constructed as to regulate and refine the cruder acts of the lower branches. Another issue had to do with the question of suffrage. Hamilton, as we have seen, advocated universal manhood suffrage. The Virginia Plan proposed that the lower house should be elected by the people. Madison and Mason supported this view in the belief that the powers of the states might be considerably weakened. By a vote of six to two the Convention provided that the lower house should be chosen by popular election. Discussions took place regarding qualifications for voting. Morris suggested that the franchise be limited to freeholders. James Wilson of Philadelphia pointed to the cumbersome variety of qualifications in the states. John Dickinson of Delaware favored a freehold qualification. Ellsworth of Connecticut, later Chief Justice of the United States, suggested that the question of suffrage be left to the states, since their ratification of the Constitution had to be secured. It was finally decided, by a vote of seven to one, that the regulation of suffrage should be entrusted to the states themselves.

The foremost issue of the Constitutional Convention was whether or

not there should be a national or a federal government; and it provoked a long and serious debate. Should the states be left free and independent, or should the Union be given a status of sovereign independence? Was sovereignty located in the states or in the nation? The issue concerned the Founding Fathers, not as an abstract question of political theory, but as a practical problem of government. They were instructed in such matters as national defense, taxation, and the economic situation. What form of government would best serve these interests and at the same time command the support of the ratifying authorities? Madison did not think that sovereignty could be defined, and held that it was only a concrete manifestation of power which shifted from day to day. The ratifying authorities clearly intended to approve a constitution which would retain the sovereignty of the states. The delegates to the Convention thought that they were making a system from which a state could not withdraw. Madison had an interesting view of the new arrangement. He declared it to be a mixed system, for ratification was federal and not national; the House of Representatives was national, the Senate federal, the Executive a compound of both; the Constitution in its operation was national and not federal, because it dealt with individuals and not with states; in the extent of its powers, federal and not national, because its powers were enumerated; and, in the amendment section, a compound of both. A majority of the members of the Convention were interested in the question, not as a philosophy of government, but as a workable arrangement. A resolution was finally passed declaring that a national government should be established. This created much dissension. Lansing of New York declared that the people of his state would not have returned delegates had they known a national government would be created; and he did not sign the Constitution. Luther Martin of Maryland vigorously attacked the instrument on the ground of its national character. He set forth that there were three parties in the Convention: the nationalists, who wanted to abolish state lines; the federalists, who were directly federal and republican; and the imperialists, representing the large states, who sought to gain particular powers over the smaller states. The nationalist and imperialist groups, he said, combined to form a national as opposed to a federal government, "designed, not to protect and preserve, but to abolish and annihilate the state governments." He withdrew from the Convention, refused his signature to the Constitution, and strenuously opposed its ratification.

The formation of the executive, legislative, and judicial depart-

ments, and the relation of the states to the Union as defined by the Constitution, are dealt with under separate headings.

Methods of Amendment and Ratification.—How should the Constitution be amended? The earlier state constitutions, containing no such provision, made no contribution to the problem. Under the Articles of Confederation, amendments, to be effective, had to be submitted in the form of a proposal by the Congress and unanimously ratified by the states. Pinckney regarded the instrument as so perfect that no amendment would be necessary. The Virginia Plan suggested some means for amendment without the intervention of the Congress. The Committee of Detail suggested that on petition of two-thirds of the state legislatures the Congress should call a convention. Hamilton and Madison were responsible for the present plan. Since the small states suggested that the states initiate the amendments, and the nationalists favored their initiation by the national government, four methods were authorized. Therefore, an amendment may be proposed either by two-thirds of both houses of Congress or by a national convention called by Congress at the request of two-thirds of the state legislatures, and ratified either by three-fourths of the state legislatures or by three-fourths of the states in conventions called for that purpose. There are two methods of proposal and two methods of ratification; and either method of proposal may be followed by either method of ratification.

How should the Constitution be ratified? We have seen that the Articles of Confederation could not be altered without unanimous consent. It was also declared by its own terms to be a perpetual union. In defense of this provision it has been claimed that the Constitution was a distinct break from the old system, and that there was no connection between the Articles of Confederation and the "more perfect" instrument. The principle of unanimous approval was abandoned, and it was agreed that the approval of nine states should constitute a ratification. The method of ratification was important. The resolution of the Congress which called for the Convention limited the powers of the delegates to the task of rendering the articles adequate to the needs of the Union. The results of their work were to be submitted to the Congress for agreement, and to the states for confirmation. Such limitations were confirmed by the states in their instructions to their respective delegates. Since these limitations were not observed, and since it was feared that the state legislatures might refuse their consent, the Founding Fathers resorted to state conventions. It was ar-

gued that the state legislatures had opposed amendments to the Articles of Confederation, and that the politicians of those legislatures would refuse to approve the establishment of officials higher than themselves, and to surrender the privileges which they enjoyed under the Articles and of which they would be divested by the Constitution. State legislatures dealing with ordinary legislation, and bicameral in character, would tend to delay and confuse the question of ratification. Moreover, a legislature meeting from year to year might be disposed to rescind its action, whereas a convention meeting especially for that purpose either would dissolve or adjourn. Further, there was the popular element to be considered. Delegates elected by the people for a specific purpose would arouse a greater interest in their support of the Constitution. Finally, it was urged that so radical a change in the form of government justified as completely different a method of ratification.

The Ratification Controversy.—The new Constitution passed from the Convention to the Congress of the Confederation on September 17, 1787. The Convention requested that the instrument be submitted to the state conventions through the state legislatures. The Constitution, therefore, passed first from the Convention to the Congress, from the Congress to the state legislatures, from the state legislatures to the people, and from the people to the ratifying conventions. On September 28, 1787, the Congress voted to refer the instrument to the states for ratification. Various objections were raised to the ratification of the instrument. Jefferson, then in Paris, wrote that four states should delay ratification until a bill of rights had been added which should provide for freedom of religion, freedom of the press, freedom of commerce against monopolies, trial by jury in all cases, no suspensions of *habeas corpus,* and no standing armies. Hamilton pointedly answered this argument by declaring that the Constitution itself was a sufficient bill of rights, and that there was no need of declaring that things should not be done when there was no power to do them. Madison, who was in favor of ratification and also of the inclusion of a bill of rights, advocated approval by the states and the subsequent addition of a bill of rights. The agricultural interests and pioneering elements regarded the commercial interests as established in power. The theory of states rights was urged and upheld by Patrick Henry. The state legislatures naturally resented being divested by the Constitution of privileges accorded them under the Articles of Confederation. The delegates, having violated their instructions as to

both the nature of the instrument and the method of ratification, incurred the enmity of many people. The advocates of paper money were naturally opposed to provisions regulating it.

In New York the ratification of the Constitution was upheld by Hamilton and Jay, and opposed by Clinton, Lansing, and Yates. The *Federalist* was used to create and influence public opinion. The instrument was ratified by a vote of 30 to 27. Massachusetts gave its ratification on February 6, 1788, by a vote of 187 to 168. In Virginia a notable controversy took place. Patrick Henry, James Monroe, George Mason, and Richard Henry Lee opposed ratification, whereas George Washington, James Madison, John Marshall, and Governor Randolph favored it. The instrument was finally ratified on June 25, 1788, by a vote of 89 to 79. In Philadelphia a serious controversy took place. On learning of the submission of the instrument by the Congress the friends of ratification compelled the legislature to issue a call for the state convention. Only thirteen hundred votes were cast for delegates. Ratification took place on December 12, 1787, by a vote of 46 to 23. Delaware, New Jersey, and Georgia gave unanimous ratification. Connecticut ratified on January 9, 1788, by a vote of 120 to 40. Maryland, the home state of Luther Martin, ratified on April 26, 1788, by a vote of 63 to 11. South Carolina ratified on May 23 by a vote of 149 to 73. In New Hampshire the ratifying convention was postponed in order that there might be wider public discussion of the issue, but the Constitution was duly ratified in June. In North Carolina the convention adjourned without ratification, but finally ratified on November 21, 1789. The people of Rhode Island rejected the Constitution upon its submission, but formally ratified it on May 29, 1790.

The Constitution enjoyed a distinguished defense and opposition. In the campaign for ratification the pamphleteer played an important rôle. It is a common practice of Anglo-Saxon peoples to settle their controversies, political, religious, and personal, through the circulation of pamphlets. An issue of this kind will call forth a flood of circulars designed to uphold or upset a given institution, policy, or order. The most notable series of articles drafted in defense of the Constitution was contained in the *Federalist*, the authors of which were Alexander Hamilton, James Madison, and John Jay. Madison declared that their immediate object was to vindicate and recommend the new Constitution to the State of New York, whose ratification of the instrument was doubtful as well as important. Hamilton originated the idea. The articles were first addressed to the people of New

York, but they soon received a general circulation throughout the states. While the series did not attain its immediate object with success, it became, nevertheless, the most important treatise on the Constitution of the United States, and has been levied upon considerably by lawyers, scholars, public officials, teachers, and judges for interpretations of our governmental system. Less distinguished but scarcely less sincere and able men also defended and opposed the Constitution. Their views were expressed through speeches and pamphlets, and in the state ratifying conventions. Such men as James Iredell, George Mason, Richard Henry Lee, Edmund Randolph, John Dickinson, Peletiah Webster, James Wilson, Noah Webster, and Elbridge Gerry participated actively in the contest. The debates of the Virginia ratifying convention, led by Patrick Henry, John Marshall, George Mason, James Madison, and George Wythe, were especially notable. In the end the Constitution was ratified and the "more perfect union" was established.

The Constitution under the Federalists.—When the Constitution went into effect, in 1789, George Washington was elected President of the United States. His administrative ability and his inclination toward centralized governmental authority fitted him for the unique task of administering the affairs of the new government. During the eight years of his incumbency he established traditions which to this day are inseparably linked with the executive office and with the general administration of the government. The workings of the Constitution during this period are the more significant because they represent the first experiences under the new instrument, and in a sense they established definite and lasting constitutional practices. The courts, in interpreting the instrument, have often adverted to such constructions as were placed upon its provisions during the first years of its application. In 1789 a law was passed providing for six justices of the Supreme Court. A system of inferior courts was set up, consisting of thirteen district courts and three circuit courts; their jurisdictions were defined, and provision was made for appeals of decisions from the state courts to the federal courts. This law set the example for the organization and power of the judiciary.

A vigorous upholder of the new system was Alexander Hamilton. His plan for a new government had been almost entirely rejected by the members of the Constitutional Convention, and he had admitted that it was probably beyond the wishes of the people. The federal scheme of the Virginia Plan having, in a sense, prevailed, he put behind it his unstinted support and set out to give the instrument a

national interpretation. As Secretary of the Treasury he at once proposed measures having to do with taxation and finance which were authorized by the sweeping powers conferred by the new law. On January 9, 1790, in a paper entitled "A Report on Public Credit," he submitted his plan for the funding of the national debt. He pointed out that there was a grand total of $56,124,463 owed by the United States. There were several classes of indebtedness, and he proposed that these obligations be called in, consolidated, and formed into a single debt against the national credit. New bonds should be issued to the holders of the old obligations, and should draw a fixed rate of interest. He also recommended that the federal government should take over the state debts, amounting to $18,271,786. As the debt was incurred for the good of all in the prosecution of the Revolution, he declared that it should be paid by all. As the states had been deprived of their power to levy taxes, the government should in justice pay what they owed at the time. His report on excises, presented on December 13, 1790, recommended a tax on distilled liquors for raising revenue to pay the interest on the funded debt. The enforcement of this law would require positive action on the part of the federal government throughout the republic. On December 13, 1790, he proposed the establishment of the United States Bank on the ground that it would provide for the issue of stable currency, would offer a safe and cheaper means of exchange, would be a medium for the purchase and sale of government bonds, and would be a secure place to care for government funds. The bank was established by law during the next year. On December 5, 1791, he submitted his report on manufactures, in which he recommended a protective tariff for the benefit of American industries. Thus the major powers granted by the Constitution to overcome the defects of the Articles of Confederation were sweepingly and immediately put into effect through the able leadership of Alexander Hamilton.

Thomas Jefferson had been appointed Secretary of State. Much of his time was devoted to the settlement of foreign questions. He opposed the United States Bank as unconstitutional, as monopolistic, and as limiting the powers of the states; and he likewise vigorously opposed the tariff and other fiscal measures. He resigned his post in 1794 and assumed the leadership of the opposing forces, hoping to break down the powerful Federalist régime through political action. Hamilton was committed to the idea of a great commercial and industrial nation, and was determined to use the powers of government to realize this ideal. Jefferson believed that the agricultural

classes were the foundation of the republic, and feared the interference of a powerful national government with the basic rights of the individual. These rights, he thought, had justified the Revolution and should be continued. Only the efforts of the people could finally settle this seemingly irreconcilable conflict.

Certain constitutional practices developed during this régime. The President at first thought that the Senate would be an advisory council to the executive, especially in the matter of treaties and appointments. After seeking the coöperation of the Senate in the making of a treaty, however, he found that body to be somewhat jealous of its authority and inclined to set up political barriers. This experience was the beginning of a long and serious divergence which still prevails between the President and Senate over foreign affairs. The Constitution provided only that the President should consult the heads of departments. Washington, however, regarded them as a collective body. He chose Alexander Hamilton as Secretary of the Treasury, General Knox as head of the War Department, Edmond Randolph as Attorney-General, and Thomas Jefferson as Secretary of State. The veto power was used by Washington as the framers had intended, namely, as a check upon the legislature. The question of the power to remove officials rose in the first Congress. Should the Senate intervene in case of removals by the President, as in the case of appointments to office? Washington was finally held to have the inherent right to remove officials without the consent of the Senate.

Reaction under John Adams.—John Adams was elected second President of the United States. He did not have the tactful ability of Washington to command the support of opposing factions. Elements opposed to the Federalist régime at once began to voice their discontent, and ill-advised repressive measures were passed to enable the President to control the situation. The Alien Act authorized the President to expel from the country or to imprison any alien whom he regarded as dangerous or whom he had any reasonable grounds to suspect of treasonable or malicious intrigues against the government. The Sedition Act was passed to punish those who attempted to create unlawful combinations against the government, and those who wrote, uttered, or published any false, scandalous, and malicious statements concerning the government, or either house of Congress, or the President, with the intent to defame the government or to bring it, or any part of it, into contempt or disrepute. Several republican editors and leaders were jailed and heavily fined for criticising Adams and his federalistic policies. Such measures, however, only hastened the doom

of the Federalist Party. Thomas Jefferson, discovering the discontent caused by the Alien and Sedition Acts, made political capital of them. He drew up a resolution which was adopted by the Kentucky legislature in 1798. It set forth that the states were not united through a principle of unlimited submission to the general government, but that by compact under the Constitution they had established a general government for special purposes. Only certain definite powers had been delegated to the general government, while each state reserved to itself the residuary mass of its right to self-government. Acts growing out of the assumption of undelegated powers on the part of the federal government were declared to be unauthoritative and void. The government set up by this compact, to which each state acceded as a state, was not made the final and exclusive judge of the extent of the powers delegated to it; for this, the resolution declared, would make the government's own discretion, and not the Constitution, the measure of its powers. Since there was no common judge, as was the case in all other compacts, each party had an equal right to judge for itself "as well of infractions, as of the mode and measure of redress." A similar resolution was passed by the Virginia legislature, which declared the Alien and Sedition Acts to be unconstitutional, and called upon other states to take appropriate steps to the end of protecting the rights of the states and of the people. Thus the Federalist and the Anti-Federalist interpretations of the Constitution were crystallizing into definite schools of political thought. In the following years the interpretation of the Constitution and the nature of the Union became the chief subjects of political controversy.

The Constitutional and Judicial Interpretation: The Decisions of John Marshall.—John Marshall was appointed Chief Justice of the United States by President Adams on January 20, 1801, and the appointment was confirmed by the Senate on January 27. He had served in the Revolutionary Army, had studied law at William and Mary College, had served in the Virginia legislature and council of state, had defended the Constitution in the Virginia ratifying convention, had been appointed minister to France, was a member of Congress during Adams' administration, and finally became Secretary of State. In performing these distinguished services he had become the leader of the Virginia Federalists, a loyal defender of Washington and Adams in their respective administrations, and a stalwart supporter of the Constitution. On March 4, 1801, as Chief Justice of the United States, he administered the oath of office to Thomas Jefferson. For thirty-four years he presided over the Supreme Court as its Chief Jus-

tice and became the foremost expounder of the Constitution. The decisions of Marshall have left a lasting impression upon constitutional interpretation. Those of constitutional importance may be classified under three headings: the constitutional limitations on the states, the general scope of federal powers, and the right of judicial review.

In keeping with his school of constitutional law, Marshall construed the Constitution strictly against the state governments. This was especially true in cases where the states attempted to invade the special spheres and the enumerated powers of Congress. The case of *Fletcher v. Peck* (6 Cranch 87) involved the contract clause of the Constitution, whereby "no state shall . . . pass . . . any law impairing the obligation of contracts." The purpose of this provision was to protect the people in the enjoyment of their contractual rights and to compel the performance of contractual obligations. In 1795 the Georgia legislature sold 45,000,000 acres of land to a land company for $500,000. The contract of purchase was in the form of a bill enacted by the state legislature. Charges of bribery were made, and the law was repealed. Mr. Peck, claiming under the original grant, brought suit in the federal courts to uphold the contract of the state legislature. Marshall held that one legislature might repeal an act of a previous one, but that when a law was in its nature a contract, and when absolute rights had been vested under it, a repeal of the law could not divest those rights. He further held that, since the words of the Constitution were general, and made no distinction as to kinds of contracts, a grant such as that of the Georgia legislature was embraced by the constitutional term, and was therefore entitled to protection under the Constitution.

The Dartmouth College case (4 Wheaton 518) involved the question as to whether or not a charter was a contract, and whether it was protected by the Constitution of the United States. In 1769 a charter had been granted to one Reverend Eleazer Wheelock for the purpose of establishing a school of religious instruction among the Indians in the State of New Hampshire. The usual corporate privileges and powers were granted, together with the right of the Board of Trustees to fill its own vacancies. In 1816 the New Hampshire legislature passed a law amending the charter by increasing the number of trustees, vesting the appointment of additional trustees in the Governor, and creating a Board of Overseers of twenty-five persons with power to review and control the more important acts of the trustees. The majority of the trustees, refusing to accept the amended charter, sued for the corporate property held by Wheelock under the New Hampshire acts,

Marshall declared that a charter was a contract, and that in this transaction every ingredient of a complete and legitimate contract was found. It was such a contract as respected property or an object of value, and had conferred rights which might be asserted in the courts of justice. The college was held to be a private institution as regards the source of its funds, the object to which the funds were applied, the act of incorporation, the persons for whose benefit the donated property was secured, the interest of the original parties to the contract, and the potential right of beneficiaries. Under the acts of the legislature the government of the college was transferred from the Board of Trustees to the state executive, and a complete reorganization was effected, converting it from a literary institution under the control of private literary men into a machine subject absolutely to the will of government. The obligation of the contract had been impaired by the acts of the New Hampshire legislature, which were therefore declared to be void.

In the case of *Ogden v. Saunders* (12 Wheaton 213) Marshall took the position that a law could not be a part of a contract because this would give the state legislature too much power. The legislature, he declared, might change the remedy, but could not change the essence of a contract. In this case, however, the majority of the court held that the obligation of the contract was the law binding the parties to do what they had agreed to do. It was the law in force at the time when the contract was made. It entered into the contract and became an essential part of it. The obligation did not inhere in the contract itself, but was a law which applied to the contract. Such was the difference between the view of Marshall and the view of the majority of his court as to the meaning of the term "obligation."

A clause of the Constitution provided that Congress should have power to establish "uniform laws on the subject of bankruptcies throughout the United States." Various state bankruptcy laws had been passed. In the case of *Sturges v. Crowinshield* (4 Wheaton 117), certain notes had been made prior to the enactment of the bankruptcy law. They fell due and a suit was instituted for their collection. The State of New York passed a bankruptcy law by which the debtor was discharged of his debt, whereupon it was claimed that the New York law operated to impair the contract. Marshall held that the states might pass bankruptcy laws not in conflict with congressional legislation. State laws that attempted to make transactions usurious and void which were not so when entered into, were declared to be unconstitutional. Moreover, a state law discharging insolvent persons from

debts contracted before the passage of the act was likewise found unconstitutional. The members of the Constitutional Convention desired to restore public confidence in private transactions by providing for their efficacy and enforcement. The New York statute operated to impair the contract and was therefore void.

The constitutional decisions of Marshall also gave a broad interpretation to the general scope of federal powers. In the case of *McCulloch v. Maryland* (4 Wheaton 316), a branch of the United States Bank was established in Maryland in 1817. In the following year the Maryland legislature required all banks in the state not chartered by the state legislature to pay a stamp tax on their note issues. Mr. McCulloch, the cashier of the Baltimore branch, was held for violating the state statute. Marshall declared that Congress had the right to incorporate a bank. The government of the Union was a government of the people and its powers were derived from them. It was a government of enumerated and limited powers, but was supreme within its sphere of action, and, within this sphere, binding on its component parts. While the establishment of a bank did not appear among the enumerated powers, no phrase excluded incidental or implied powers. The Constitution was expounded from the point of view of the general scope of federal powers granted by it, and should be viewed as a whole. Congress was authorized to make "all laws necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States or in any department thereof." Under this clause Congress might provide for the execution of those great powers on which the welfare of the nation essentially depended, because the clause was found among the powers of Congress, and not among the limitations on those powers; and also because its terms were intended to enlarge and not to diminish the powers vested in the government. The bank was, therefore, held to be a necessary function of government. The power of Congress in this respect was classically expressed by Marshall in the following terms: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but which consist with the letter and spirit of the Constitution, are constitutional." The decision also expressly limited the authority of the states. Did Maryland have the power to tax the local branch of the United States Bank? While not expressly prohibited by any constitutional provision, it was axiomatic that the Constitution, and the laws made in pursuance thereof, were supreme and that they

controlled the constitutions and laws of the respective states. It was therefore settled that the power to create implied the power to preserve; that the power to destroy, wielded by a different hand, was hostile to, and incompatible with, the powers to create and to preserve; that the power to tax involved the power to destroy; that the power to destroy might defeat and render useless the power to create; that where this repugnancy existed, that authority which was supreme should control, and not yield to that authority over which it was supreme; and that the tax on the operations of the bank was also a tax on the operations of an instrument employed by the government to carry its powers into execution, and should be regarded as unconstitutional.

The case of *Gibbons v. Ogden* (9 Wheaton 1) involved the power of Congress over interstate commerce. Marshall held that the principle of strict construction of the last of the enumerated powers, namely, that of making all laws necessary and proper to carry the powers of government into effect, could not be used to cripple the government and render it unequal to the accomplishment of the purposes for which it was declared to be instituted. The purely internal commerce of a state was reserved to the state itself. The power to regulate interstate and foreign commerce, however, like all other powers vested in Congress, was complete in itself and might be exercised to its utmost extent, acknowledging no limitations other than those prescribed in the Constitution. A license granted by act of Congress to carry on coasting-trade meant authority to do so, and a law inconsistent with that license was unconstitutional.

In the case of the *American Insurance Company v. Canter* (1 Peters 511) it was held that Congress, through its constitutional authority to make war and negotiate treaties, might acquire territory either by conquest or by treaty, and that territories so acquired might be provided by Congress with a form of government, including courts of law. The judicial arrangements for such territories provided by Congress were not violations of the Constitution, as the judicial clause of the Constitution did not apply to such territories.

The most distinguished contribution of John Marshall to constitutional interpretation was the right of judicial review, or the power of the Supreme Court to set aside acts of Congress in conflict with the fundamental law. This principle was established in the case of *Marbury v. Madison* (1 Cranch 137). One Mr. Marbury had been appointed Justice of the Peace in the District of Columbia. The ap-

pointment had been confirmed and the commission had been signed and sealed, but President Jefferson instructed that the papers should not be delivered. Marbury appealed to the Supreme Court for a writ of *mandamus* to Secretary Madison, who had refused to deliver the commission. Marshall held that the applicant had a right to the commission he demanded, and that a remedy was afforded by the laws of the United States. The remedy for which he applied, however, was not the proper one. The Judiciary Act of 1789 authorized the Supreme Court to issue writs of *mandamus* to any courts appointed or persons holding office under the authority of the United States. The power to issue such a writ, however, was not within the original jurisdiction of the Supreme Court as defined by the Constitution. An act of Congress conferring original jurisdiction in cases not enumerated in the Constitution was clearly repugnant to the instrument.

Marshall asked the question: Might a jurisdiction conferred by Congress, not warranted by the Constitution, be exercised? Might such a repugnant act become the law of the land? The people, he declared, established their fundamental principles of government, while acts emanating from, and rules established by them, were supreme and permanent. Such original and supreme will organized the government, and assigned to the different departments their respective powers. It might stop there or establish limits not to be transcended by those departments. Our written Constitution expressly defined and limited the powers of government. If constitutional limits might at any time be passed by those intended to be restrained, then the doctrine of constitutional limitations was ridiculous. Did a legislative act repugnant to the Constitution, notwithstanding its invalidity, bind the courts and obligate them to give it effect? It devolved upon the judicial department to say what the law was, and where two laws conflicted it devolved upon the courts to decide on the operation of each. Therefore, if a law and the Constitution applied to a particular case, it devolved upon the court to decide between them. If the Constitution was superior to the ordinary act, then the Constitution should govern in the case to which both applied. The framers of the Constitution intended that the instrument should operate as a rule for the government of courts as well as of the legislature. Judges took an oath imposed by the legislature to discharge their duties agreeably to the Constitution of the United States. "Thus," said Marshall, "the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all

written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument.''

The Constitution and Judicial Interpretation: The Decisions of Chief Justice Roger B. Taney.—Upon the death of John Marshall, in 1836, Roger B. Taney became Chief Justice of the United States. As Attorney-General and also as Secretary of the Treasury under Jackson, he became the President's chief legal and financial adviser. A believer in the principles of the Democratic Party and a states rights man, he opposed the doctrines of Marshall and belonged to the school of the strict or narrow constructionists. For a period of almost thirty years he gave the decisions of the Supreme Court a trend toward states rights.

The State of Kentucky organized a state bank. The stock was subscribed by the state, consisting of money paid for state lands. The bank was authorized to issue notes payable to bearer—that is, the bank, not the state. The case of *Briscoe v. the Bank of Kentucky* (11 Peters 257) had come before Marshall's court in 1834; but as there were only four justices on the bench, the case was postponed. When Taney became Chief Justice, his court decided that the bills were issued, not by the state, but by the bank, and that the prohibition in the Constitution against the issue of bills of credit by a state did not forbid the issue of circulating notes by a state-chartered corporation, even if the state owned all the stock therein. This decision resulted in the chartering of banks by the states to issue paper money.

The case of *Charles River v. Warren Bridge* (11 Peters 420) involved a grant by the legislature of ferry rights to Harvard College. In 1785 the Massachusetts legislature had authorized the proprietors of the Charles River Bridge to erect a bridge in place of the ferry and to collect tolls for its use. The bridge was opened in 1786 and in 1792 the charter was extended for a period of seventy years. In 1828 the Warren Bridge Company was authorized to construct a bridge a short distance from the Charles River Bridge, which was to be free in six years, or sooner if tolls paid its cost before then. As a result, the old company was destroyed and an injunction was sought restraining the construction and use of the bridge it had proposed to erect. The question in the case involved the right of a state which granted a charter to destroy the effect and value of a previous charter. Did it constitute an impairment of a contractual obligation? Taney declared there was no evidence of an exclusive franchise and that only a strained interpretation of the words of the charter could bear out such

a conclusion. The English courts restrained the spirit of monopoly within strict limits. Old franchises and contracts should not be construed to prevent new ones which introduce desirable improvements and take advantage of modern science, even when they conflict with the old. The charter should be strictly construed, and nothing could be claimed which was not clearly given. Ambiguity should be resolved in favor of the public and against the corporation. The rights of the community, he declared, must be safeguarded, as well as the rights of private property. With this decision Taney began construing the Constitution freely for the state and narrowly for the individual. Marshall regarded the end of government and the purpose of the Constitution as the protection of individual and private rights; Taney regarded the happiness and prosperity of the people and of the community as paramount. Justice Story dissented from Taney's opinion, and soon resigned from the court.

The most famous decision of Chief Justice Taney was that of *Dred Scott v. Sandford* (19 Howard 393). The decision was one of great historical import, and contributed largely to the outbreak of the Civil War. In rendering the decision the court desired to settle the question of the power of Congress over slavery in the territories. Under the Missouri Compromise of 1820 Maine was admitted to the Union as a free state and Missouri as a slave state. One Dred Scott, a negro slave, was moved from Missouri, a slave state, to Illinois, a free state. He was later taken to the territory of Minnesota, which was free, and still later back to Missouri. Scott claimed that he was free because of his removal to free territory under the Missouri Compromise. Taney declared that the framers of the Constitution did not intend that negroes should be citizens and that states could not make them such. Moreover, the laws of Congress disclosed the fact that negroes were not citizens, and Scott's residence in Minnesota, a free territory under the Missouri Compromise, did not operate to free him. The territorial clause of the Constitution referred to the territory of the United States as it existed in 1789. Under the Fifth Amendment Congress could not deprive a person of life, liberty, or property without due process of law, and a law which took from a white man that for which money had been paid was a violation of the amendment. The Missouri Compromise, having this effect, was unconstitutional; Congress did not have the power to pass it, and Dred Scott was not a citizen of the United States. The important point in the decision was not the freedom of Dred Scott, but the refusal of the court to admit the right of the Congress to exclude slavery from

territories acquired since the establishment of the Constitution. Correspondence between President Buchanan and Justices Catron and Grier disclosed that the executive and a majority of the court desired to set at rest the question of regulating slavery in the territories.

In the case of *Ableman v. Booth* (21 Howard 506), Taney held that the Fugitive Slave Law was constitutional and that the Supreme Court was the ultimate tribunal competent to decide between the state governments and the national government. In this case he upheld the supremacy of federal jurisdiction over the state courts. He vigorously assailed the supremacy asserted by state courts over federal courts and declared that supremacy must be connected with permanent judicial authority, else controversies between jurisdictions would have to be settled by force of arms. This was in answer to an attempt on the part of the Supreme Court of Wisconsin to declare the Fugitive Slave Law, providing for the punishment of those who aided and abetted the escape of slaves, to be unconstitutional.

In the case of *Ex parte Merryman*,[1] Taney held that the right to suspend the writ of *habeas corpus* followed an enumeration of legislative powers, and that only Congress could lawfully exercise the right. This was in answer to the practice adopted by military officials of suspending the writ in districts under their military control.

The Bill of Rights.—Madison and Jefferson favored the introduction into the Constitution of a bill of rights which would protect and guarantee fundamental privileges. Madison supported the ratification of the Constitution, but in 1789 introduced in Congress the amendments which provided in the main for the basic constitutional guarantees. Hamilton was opposed to the adoption of the bill of rights on the ground that the Constitution itself was a limitation on the abuse of power. The first ten amendments were ratified by all of the states except Connecticut, Georgia, and Massachusetts, and came to be known as the Bill of Rights.

Congress can make no law respecting the establishment of religion, nor can it prohibit the freedom of religious worship. All persons, therefore, have the free and unlimited right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine, which is in keeping with the laws of morality and property, and which does not infringe personal rights. But no person, through religion or through religious ceremony, can violate the laws of the land; nor does religious belief absolve anybody of his duties to aid in the defense of the state. Congress is also forbidden to abridge free-

[1] Federal Cases, No. 9487.

dom of speech or of the press. This right does not permit the publication of libels and of blasphemous or other indecent articles or publications injurious to morals or private reputations. The restraint of persons saying or printing anything which might hinder the operations or success of the American forces in time of war is not regarded as an abridgment of freedom of speech or of the press. Congress can pass no law abridging the right of the people peaceably to assemble and to petition the government for a redress of grievances. Thus assemblages for any legitimate purposes are protected, unless the exercise of the right is not in keeping with the public peace, security, and welfare. The right of petition is historic and may be used as a lawful occasion for the people to assemble. The right may be exercised, however, in such a manner as to violate the Espionage and Sedition Laws. Petitions for the repeal of these acts and against military measures in time of war have been held to violate the measures prescribed by Congress for the purpose of restraining the people at such times. The right of the people to keep and bear arms cannot be infringed by Congress, as organizations of soldiers are necessary to the security and defense of a free state. The right to bear arms may extend to the keeping and carrying of weapons for necessary self-defense, or for the defense of the home. The amendment is not violated when it is extended to prevent the carrying of concealed weapons. Soldiers cannot be quartered in any house in time of peace without the consent of the owner, or in time of war save in a manner prescribed by law. This was an answer to one of the grievances of the Revolutionary period, and was designed to prevent unnecessary and inconvenient military intervention. The people are guaranteed against the violation by Congress of their right to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. The test of unreasonableness is a judicial question, but the immunity within proper limits is enforced. Nor shall warrants be issued save upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized. The search warrant is necessary in order to make possible the gathering of evidence. However, such warrants must meet the constitutional requisites, else evidence secured under them is inadmissible. No person can be held to answer for crimes unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the militia, or in actual service in time of war or of public danger. The Grand Jury indictment is intended to prevent the waste of time and money in the trial of cases where the

evidence seems insufficient for conviction. Before the trial can proceed, an indictment must be returned against the accused. No person shall be subject, for the same offense, to be twice put in jeopardy of life or limb. Trial and acquittal of an accused person in a federal court means that the person has answered to society insofar as that offense is concerned. No person shall be compelled in any criminal case to be a witness against himself. Proof of crime must consist of the sworn testimony of witnesses, and of the evidence of facts and circumstances, independent of admissions made by the defendant. The accused may at will be a witness for himself, but cannot be compelled to be a witness in any case. Involuntary confessions induced by promises or threats are inadmissible. A person may at his own discretion waive this constitutional guarantee, but his statement must be made on his own volition, without any promises, intimidations, or persuasion. Under the Fifth Amendment a person cannot be deprived of life, liberty, or property without due process of law. The phrase "due process of law" is derived from Article 39 of *Magna Charta,* which prescribes that a freeman may be punished only by "the lawful judgment of his peers or by the law of the land." It has been held that due process of law, within the meaning of the Fifth Amendment, refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. It also implies legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. The United States has the right of eminent domain, but the Constitution declares that private property shall not be taken for public use without just compensation. Where private property is required for public purposes, ownership of land cannot stand in the way of the public good, but adequate compensation must be paid. A regular legal process is provided by law for the purpose of determining the value of the land and the mode of its transfer from the owner to the government. The accused is protected in the enjoyment of certain rights in all criminal prosecutions. An open and speedy trial must be afforded, to take place in the state and district where the crime was committed. Moreover, the district where the trial is held must have been previously ascertained by law. The accused must be informed of the nature and cause of the accusation. He is entitled to be confronted with the witnesses against him, and he may also have compulsory process for obtaining witnesses in

his favor. Moreover, the accused shall have the assistance of counsel for his defense. The most important guarantee in this connection is that of trial by an impartial jury. This is a fundamental right and is protected by the state and federal constitutions. The Petit Jury is an institution of English law. Alterations that have the effect of destroying the inherent elements of the jury system cannot be made by Congress. A jury of twelve men is guaranteed in criminal cases, and its decision must be unanimous. The selection of jurors must be made in such a way as to secure impartiality and competence. Moreover, the special province of the jury, that of answering to questions of fact, must be maintained. With these essential elements the legislative power cannot interfere. The right of trial by jury in suits of common law is preserved where the value in controversy exceeds twenty dollars. This guarantees to the individual the right of a jury trial in civil cases, but it does not extend to cases of equity jurisdiction. No facts tried by a jury may be reëxamined in any court of the United States otherwise than according to the rules of the common law. This means that the reëxamination can take place only through the granting of a new trial or an appeal to a higher court. In punishing for crime, excessive bail cannot be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. These restrictions are designed to prevent the idea of punishment for its own sake and to limit the punishment to the severity of the offense.

These basic rights are limitations upon Congress alone. In most of the state constitutions the state legislatures are likewise prevented from invading the fundamental constitutional guarantees. Such, in brief, are the provisions of the American bill of rights.

Amendments to the Constitution.—The fundamental legal rights of the American people are comprehended under the first eight amendments to the Constitution. The Ninth and Tenth Amendments reserve to the states or to the people all rights not expressly delegated to Congress. These amendments are discussed under their appropriate headings.

The Eleventh Amendment

The background of the Eleventh Amendment is the case of *Chisholm v. Georgia* (2 Dallas 419). It involved the question as to whether or not a state might be sued by private citizens. Mr. Chisholm attempted to collect an old debt of the Revolution. The Georgia House of Representatives contended that the Supreme Court could not assume juris-

diction in an action by a citizen against a state, and accordingly passed a resolution forbidding the execution of judgments of federal courts by federal officials in the State of Georgia. The Supreme Court assumed jurisdiction and directed the serving of papers on the Governor and Attorney-General of the state. It was stated that, unless the state appeared to defend, judgment would be entered by default. This decision caused widespread protest. The Georgia House of Representatives enacted that any official who attempted to enforce the decision should be declared guilty of a felony and suffer death without benefit of clergy by being hanged. The Massachusetts legislature strongly opposed the measure. This agitation resulted in the Eleventh Amendment, ratified in 1798, which provided that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." It is clear that the framers of the Constitution did not intend that the federal judiciary should be authorized to entertain suits by individuals against states. It was subsequently held that the amendment applied to past as well as to future cases, and to citizens of the state being sued, even though not expressly so set forth in the provisions of the amendment.

The Twelfth Amendment

The Twelfth Amendment concerned the so-called "electoral college." The provision in the Constitution required that the presidental electors chosen in the states should cast their ballots for two persons, without designating the president or the vice-president. The person receiving the largest number of votes was to be president, if the number were a majority of the whole number of electors appointed. Should there be an equal number of votes, the House of Representatives should choose one of them, by ballot, for president. If no person had a majority, the House of Representatives should then choose in like manner a president from the five highest on the list. Each state in the House elections should have one vote. In the election of 1800 Thomas Jefferson and Aaron Burr each received seventy-three votes. The election was therefore thrown into the House of Representatives, where Burr, through political intrigue, attempted to wrest votes from Jefferson. The Twelfth Amendment, effective on September 25, 1804, required that electors should designate the persons for whom they cast their ballots for president and vice-president respectively. This

amendment required the electors to have their candidate for president definitely in mind and prevented a deadlock or an election by the House occasioned by an equal number of votes.

The Thirteenth Amendment

The first of the Civil War amendments was the Thirteenth Amendment. Slavery had been abolished in the territories during the early years of the conflict, and on January 1, 1863, slaves in the seceding states were declared by a proclamation of President Lincoln to be free. This was an executive military measure adopted during the war, and there was some doubt as to its application in time of peace. Leaders of Congress were of the opinion that slavery in the seceding states could be effectively and permanently abolished only by an amendment to the Federal Constitution. The abolition of slavery was predicted by Lincoln in his annual message of December 6, 1864. An amendment passed Congress in 1865, and was ratified by twenty-seven states. It went into effect on December 18, 1865, and provided that neither slavery nor involuntary servitude, except as a punishment for crime whereof the party should have been duly convicted, should exist within the United States or any place subject to its jurisdiction.

The Fourteenth Amendment

The Fourteenth Amendment is the most important from the standpoint of its application. Its provisions relate to citizenship, the privileges and immunities of citizens, due process of law, the apportionment of representatives in Congress among the states according to their respective numbers, the exclusion from office of persons who, having previously sworn to support the Constitution, had supported rebellion, the validation of debts incurred by the government during the Civil War, the nullification of debts incurred in aid of the rebellion, and the power of Congress to enforce the provisions of the amendment by appropriate legislation.

The clause relating to citizenship provides that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. The purpose of this amendment was to give constitutional effect to the Civil Rights Act, and to establish incontrovertibly the proposition that people of the black race, native or naturalized, were citizens according to the Constitution. This portion of the amendment

is set forth fully in the chapter on "The Constitution and the Citizen."

The outstanding provision of the Fourteenth Amendment is the famous "due process" clause, which reads: "nor shall any state deprive any person of life, liberty, or property without due process of law." It was drafted by John A. Bingham of Ohio. The ostensible purpose of the amendment was the protection of freedmen. Its effect, however, was to extend the power of the federal government and to subject many of the acts of states and municipalities to review by the federal courts. The radical leaders of Congress, while seeking to benefit the South through the second, third, and fourth sections of the amendment, and to elevate the position of the negro through the fifth section (in addition to the Thirteenth and Fifteenth Amendments), also had in mind vesting in the federal government, through Section I, important powers until then enjoyed only by the states. Roscoe Conkling said that the intent of the committee which drafted the provision was not only to lift the negro from bondage, but to protect business interests and corporations seeking freedom from the interference of legislatures. The meaning of the term "due process" is discussed elsewhere. The interpretations of the Supreme Court of this part of the amendment may briefly detain us here. In the *Slaughter House Cases* (16 Wallace 36) it was held that the Fourteenth Amendment, in defining a citizen of the United States, did not increase privileges and immunities enjoyed by a citizen prior to its adoption. It was not the intent to bring within the power of Congress or within the grasp of the Supreme Court the sphere of civil rights which had belonged exclusively to the states. To do so, said the court, "would constitute this court a perpetual censor upon all legislation of the states on the civil rights of their own citizens." The later cases turned on economic questions. War and reconstruction problems were out of the way, and questions as to the nature of the Union had been settled. The court now dealt with new social and economic issues, such as the Granger Laws, the regulation of interstate commerce, the question of public utilities and rates, strikes and industrial conflicts, and many other cognate subjects. In the case of *Minnesota v. Illinois* (94 U. S. 113), the main question was whether or not the Illinois legislature had the power to fix rates for the storage of grain without its amounting to a deprivation of property without due process of law. The court contended that property became clothed with a public interest when used in a manner to make it of public consequence and to affect the community at large. When,

therefore, a man devoted his property to a use in which the public had an interest, he granted to the public an interest in that use and should submit to control by the public for the common good to the extent of the interest he had thus created. The public had a direct and positive interest in the grain elevator business, to which the interest of public control might constitutionally be applied. For protection against abuses the people must resort to the polls, not to the courts.

In the case of the *Chicago, Milwaukee, and St. Paul Railway v. Minnesota* (134 U. S. 418), the Minnesota legislature had created a commission with authority to put into effect its own rates in case unequal or unreasonable rates were adopted by railroads. The commission had rate-fixing powers. The Supreme Court held that where rates had been determined by legislative authority, depriving the railroad of its clear rights of judicial investigation of the reasonableness of the rates established, the act was void. Therefore, it was a violation of the Fourteenth Amendment.

In the case of *Smyth v. Ames* (169 U. S. 145), the Supreme Court reversed its former position in the case of *Munn v. Illinois,* and expressly extended the application of the Fourteeenth Amendment to state and local legislation affecting business and public utilities. A Nebraska legislature had passed a law which classified freights, fixed freight rates, and created a railroad commission with power to reduce rates in order to make them reasonable and just. The act also provided that the railroad might appeal to the courts against the regulations of the commission. The Supreme Court declared that a corporation was a person within the meaning of the due process clause of the Fourteenth Amendment; that rates which would not allow such compensation as was just to the railroad and the public, under all circumstances, amounted to a deprivation of property without due process of law; that rates were primarily for legislative determination, but were subject to judicial inquiry; and that the proposition that a legislature, state or federal, could determine what was constitutional, was contrary to the entire theory of the American Constitution. The factors which should enter into the determination of a just rate were set forth by the court.

What are the liberties of which a person may not be deprived without due process of law under the Fourteenth Amendment? Much discussion has taken place over this question. It has been extended by the courts to include the right to contract. A statute of the New York legislature prohibited any person employed in a baking or confec-

tionary establishment from working over sixty hours a week or an average of ten hours a day for the number of days the employees worked. This statute was reviewed by the Supreme Court in the case of *Lochner v. New York* (198 U. S. 45). The court determined that the right to make a contract was a part of the liberty of the individual protected by the Fourteenth Amendment, and the right to purchase or sell labor was part of the liberty protected by the amendment, unless circumstances existed which excluded the right. This statute was declared void as interfering with the right of freedom of contract. Associate Justice Holmes rendered a famous dissenting opinion. He declared that the liberty of the individual to do as he liked so long as he did not interfere with the liberty of others to do the same, was interfered with by many laws. In support of this contention he said: "I think that the word 'liberty,' in the Fourteenth Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." In time the right to contract was regarded as a liberty which state laws could not impair. According to Justice McReynolds, it denotes the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. Thus the right to contract would encompass all of man's affairs and activities. President Roosevelt, taking an opposite view, declared that the liberty to contract was "often a merely academic liberty, the exercise of which is the negation of real liberty."

The Fifteenth Amendment

Property qualifications for suffrage established by the states had been abolished during the first part of the nineteenth century. The reform of the suffrage, however, did not extend to free negroes, except in a few states. The Thirteenth and Fourteenth Amendments guaranteed the freedom and citizenship, respectively, of the negroes. Clauses were introduced into the Fourteenth Amendment providing that representatives should be apportioned among the states according to their total population, excluding Indians not taxed. When

the right to vote at a state or federal election was denied to adult male citizens, except for crime, the basis of representation for the state in Congress was to be proportionately reduced. The states might disfranchise any class of persons, but in doing so they faced a loss of representation in Congress. These were only steps toward the enfranchisement of the negro, which was definitely accomplished by the Fifteenth Amendment, adopted in 1870. It provided that the right of citizens in the United States to vote should not be denied or abridged by the United States or by any of the states on account of race, color, or previous condition of servitude. Moreover, Congress was authorized to enforce these measures by appropriate legislation. The *Slaughter House Cases* interpreted the Fifteenth Amendment as extending the right of suffrage to negroes in every state of the Union, as the Fourteenth Amendment had made them citizens everywhere within the United States. The Civil Rights Act provided punishment for conspiracy "to injure, oppress, threaten, or intimidate any person in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States." Prosecutions under this act were confirmed by the Supreme Court as a lawful use of the power granted to Congress to enforce the Fifteenth Amendment. The court decided that the Fifteenth Amendment did, *proprio vigore,* substantially confer upon the negro the right to vote, and that Congress had the power to protect and enforce that right. The Supreme Court also held that a state might establish a literacy test for electors applying to all persons, with no discrimination against colored persons as such, even though its application disfranchised more members of one race than of another. It follows, therefore, that the Fifteenth Amendment does not confer suffrage directly upon the negro and that it does not restrict qualifications of age, sex, education, property, or birth. The "Grandfather Clause," adopted in several states, excluded from suffrage practically all negroes who did not satisfy the educational and property tests, but included a number of white persons who did not have these qualifications. The practice was to exempt from the literacy test any person who on, say, January 1, 1866, or at any time prior thereto, was entitled to vote under any form of government, and any lineal descendant of such person. Thus negroes who did not have the right to vote at the time, and their descendants, fell outside the exempted class. The Supreme Court held that such provisions were unconstitutional on the ground that their purposive effect was to disfranchise former negro slaves and their descendants, in violation of the Fif-

teenth Amendment. This amendment was directed against the action of states and not of individuals.

The Sixteenth Amendment

The Constitution originally provided that representatives and direct taxes should be apportioned among the several states according to their population, and that no capitation or direct tax could be laid unless in proportion to the census arranged for in the Constitution. Congress was given the power to lay and collect taxes, duties, imposts, and excises. Duties, imposts, and excises should be uniform throughout the United States. In the case of *Hylton v. United States* (3 Dallas 171), the Supreme Court held that an annual tax on a carriage for the conveyance of persons was constitutional because it did not lay a direct tax. In the opinion of the court only capitation and land taxes fell within this category. Hamilton, in preparing his brief for the government, declared that capitation or poll taxes, taxes on lands and buildings, general assessments, whether on the whole property of individuals or on the individual's whole real or personal estate, were direct taxes; everything else was to be considered indirect. This view was reaffirmed in the case of *Springer v. United States* (102 U. S. 586). On August 27, 1894, an income tax law was passed by the Congress, which sought to shift a part of the burden of taxation to the East. A tax of two per cent was levied upon incomes in excess of $4000 received by all persons, corporations, or associations in the United States. The constitutionality of the act was put to the test in the case of *Pollock v. Farmers' Loan and Trust Company* (158 U. S. 601). The case was tried twice. Pollock, a stockholder in the defendant corporation, sought to enjoin the defendant from paying the tax on the ground of its unconstitutionality. The income of the corporation was derived principally from real estate, from municipal bonds, and from corporate stocks and bonds. The Supreme Court declared in its final decision that taxes upon real estate or rents on real estate were direct taxes, that taxes on stocks and bonds or other forms of personal property or income from personal property were direct taxes, and were therefore invalid because they were unequal. This decision led to a party controversy. In the Democratic platform of 1896 a plank was inserted attacking the judiciary and the decision as favoring the so-called "propertied class." The proposal found a place in subsequent Democratic party platforms. President Roosevelt advocated the measure. The Republican platform of 1908 did not mention

the income tax, but Mr. Taft, in his speech of acceptance of the Republican nomination, declared himself to be personally in favor of it. After considerable discussion between Mr. Taft and the leaders of Congress an income tax amendment was proposed and was adopted in 1913. It provides that "The Congress shall have power to lay and collect taxes on incomes from whatever source derived without apportionment among the several states, and without regard to any census or enumeration."

The Seventeenth Amendment

The election of senators by the people was proposed by James Wilson in the Constitutional Convention. The idea of the framers of the Constitution was to establish a permanent conservative element in the government in the form of the Senate. The popular election of presidential electors was widely adopted during the Jeffersonian democracy, but this demand did not extend to the election of senators. The subject was agitated mildly at different times during the nineteenth century, and in 1892 the Populists inserted it as a plank in their platform. The Socialists followed in 1896, and the Democrats in 1900. In 1908 President Taft declared himself in favor of the measure, although the Republican platform of that year did not mention the subject. An amendment proposed by the House of Representatives passed that body by the necessary majority a number of times. The Senate, fearing inroads on its method of election, refused its consent. In 1904 the State of Oregon provided for the election of senators by extra-official means. Senator Chamberlain, though a Democrat, was elected by a Republican legislature, due to the instructions of the people of the state. By 1910 three-fourths of the states had adopted some form of primary election of senators. As the character of the Senate had been changed through this indirect method of popular election, the Senate approved the measure in 1911, and it was ratified by the states in 1913.

The Eighteenth Amendment

A temperance movement briefly antedating the Civil War became pronounced in some of the states. After the war, in 1872 the Prohibition Party entered the political arena by holding a national convention, drafting a platform, nominating candidates, and organizing a political party. Candidates and platforms were periodically sub-

mitted to the people, but little headway was made through this partisan movement. The prohibition issue was championed in time by leaders of the old parties, the leading figure being William Jennings Bryan. The Anti-Saloon League was organized, which aimed at the elimination of the saloon through state and local action. State and local elections were held throughout the country, with the result that many local communities passed dry laws. A number of prominent citizens who favored the principle of settling questions by localities were not in sympathy with prohibition as a national issue. The nation especially was regarded as too large a unit. Prior to 1917 eleven states had adopted constitutional prohibition, ten had adopted statutory prohibition, and five others had prohibition laws or amendments under way. In that year Congress prohibited the manufacture and importation of spirituous liquors for beverage purposes during the war, and in December it adopted the prohibition amendment and submitted it to the states. It was ratified by forty-six states and was put into effect by its own provisions on January 16, 1920. It forbids the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to its jurisdiction, for beverage purposes. Congress and the states were given concurrent power to enforce the amendment. It was also provided that the amendment should be inoperative unless ratified by the necessary number of states within seven years from the date of submission.

The *National Prohibition Cases* (253 U. S. 221) involve the constitutionality of the amendment. It was contended that the Eighteenth Amendment had overridden the implied limitations of the amending power under the Constitution. In support of this proposition it was urged that the so-called Eighteenth Amendment was not really an amendment, the function of which is to change or improve existing provisions of the Constitution, and not to add to it grants of power hitherto unknown; that it was not an amendment within the meaning of the Constitution for the reason that it was in its nature legislation acting upon the rights of individuals, instead of dealing only with powers of government; and that the Constitution in all its parts looked to an indestructible union of indestructible states. The states only, through their police power, might legislate respecting prohibition. To these propositions it was replied that nothing in the constitutional or ratifying conventions disclosed any intent of the framers to exclude changes of any kind which could muster the requisite support at any time, with the exception of those expressly

excluded in the amending clause; that the propositions advanced pointed to what an amendment should or should not be, rather than to what amendments it was constitutionally possible to adopt; and that an unalterable system of government was not in the minds of the framers, because they definitely intended to provide a means for necessary changes. Accordingly, the only portion of the Constitution which could not be amended was the section which guaranteed the states equality of representation in the Senate. The court, therefore, declared that the prohibition of the manufacture, sale, transportation, importation, and exportation of intoxicating liquors for beverage purposes, as embodied in the Eighteenth Amendment, was within the power to amend reserved in Article V of the Constitution.

The amendment, however, did not indicate the percentage of alcohol required to make a beverage intoxicating. It was urged by some that liquors containing three per cent or even more alcohol were not intoxicating. The Volstead Act, a law passed to enforce the Eighteenth Amendment, placed the maximum percentage of alcohol at one-half of one per cent. The office of Prohibition Commissioner was created in the Treasury Department, charged with the large responsibility of enforcing prohibition. The Supreme Court recognized that there were limits beyond which the Congress could not go in treating beverages as within its power of enforcement, but held that those limits had not been transcended by the provision of the law which designated liquors containing as much as one-half of one per cent of alcohol as liquors for beverage purposes.

The issue today concerns the business of enforcement. Within recent months a concentrated attack has been directed both against the amendment and against the enforcement law. If the history of previous amendments is repeated, this one will likely not be repealed, no matter how unpopular it may be to a certain group, class, or section of the country. There may be a substantial modification of the enforcement act which will permit a more generous consumption and sale of liquors of alcoholic content larger than one-half of one per cent. The charge that respect for all law has been undermined because of repeated violations of the prohibition amendment and statutes is not necessarily an argument against the amendment or the law, or against the enforcement of either. It is poor philosophy or practice which will dictate the repeal of a law merely because it is unpopular or because it is violated by a considerable portion of the people. Is it the greatest good for the greatest number? With all the discussion, there is little to indicate that the practice of rum-running and boot-

legging will cause the people to return to the abuses and evils of the wide-open saloon.

The Nineteenth Amendment

In the case of *Minor v. Happersett* (21 Wallace 162) the Supreme Court held that the right to vote was not necessarily a privilege or immunity before the adoption of the Fourteenth Amendment, and that only such privileges and immunities as the citizens enjoyed when it was adopted were guaranteed. Suffrage was not one of the existing privileges, and the states as such, and not the United States, had the right under the Constitution to qualify voters. Therefore, a suit instituted by one Mrs. Minor, contending that her privilege to vote as a citizen under the Fourteenth Amendment had been abridged, failed in the court. The woman suffrage movement gathered momentum slowly but surely. In 1838 Kentucky allowed women to vote in school elections; and Kansas did likewise in 1861. In 1869 the Territory of Wyoming gave women the same rights as men in electing territorial officers. By the end of the nineteenth century Colorado, Idaho, Wyoming, and Utah had adopted woman suffrage. In 1868 the Susan B. Anthony amendment was introduced in Congress, and its first reward was ridicule. The opponents of the measure declared that the place of women was in the home, that they had adequate representation at the polls through their male relatives, that interest in voting would subside as the novelty of it wore off, and that an increased electorate would merely mean increased expenditures. On the other hand, the advocates of the measure declared that women had the same interests as men, being tax-payers, professional workers, wage-earners, and property-owners. Furthermore, women would have a purifying influence on politics, and woman suffrage was essential to sex equality. The supporters of the measure directed their attention to the states. In 1916 the leading parties endorsed equal suffrage through the action of the states. By 1917 twelve states had admitted women to vote at all elections, and others had provided a limited franchise for women. President Wilson, during his first administration, declared himself to be bound in this matter by the position of his party, which was that the question should be left to the action of the states. During the World War he asked Congress in a special message to submit a suffrage amendment, because the country needed the help of its women and they should be appropriately rewarded. On June 4, 1919, the amendment was adopted by Congress, and on Au-

gust 28 the adhesion of the necessary three-fourths of the states was gained by the ratification of Tennessee. The amendment provides that "the rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex."

The Proposed Child Labor Amendment.—The regulation and prevention of child labor has been agitated by social workers for many years. Opposition to the reform came from states where large numbers of children were employed. The Child Labor Act of 1916 prohibited the transportation from one state to another of any goods manufactured in any establishment in which children under a certain age-limit were employed. The Supreme Court declared that the prohibition or limitation of child labor in mines and factories, while desirable, should be decided by each state for itself. Congress has full power to regulate commerce, but cannot prescribe how the states shall exercise their own police powers within their own borders. The law therefore usurped powers reserved to the states under the Tenth Amendment. To give it effect would eliminate the control of states over local matters, and the dual system of the American Government would be destroyed. The Child Labor Act of February 24, 1919, imposed a tax of ten per cent on the net annual income of a person who employed one or more than one child in any mine or factory within the United States even for a single day. In the case of *Bailey v. Drexel Furniture Company* (259 U. S. 20) Chief Justice Taft declared that the so-called "tax" was imposed to stop the employment of children within the age-limits prescribed by the law. Its prohibitory and regulatory effect, he said, was palpable. Such powers given to Congress, and such magic given to the word "tax," would break down all constitutional limitation of the powers of Congress and would completely wipe out the sovereignty of the states. The tax, therefore, lost its character as such and became a mere penalty with the characteristic regulation and punishment. The law was therefore declared unconstitutional.

President Coolidge, in his first message to Congress, presented in December, 1923, endorsed the measure unqualifiedly. The Republican platform of 1924 supported an amendment which would authorize a Child Labor Law. In a certain sense the question became a political issue. Congress accordingly submitted an amendment to the states, providing that Congress should have power to limit, regulate, and prohibit the labor of persons under eighteen years of age. It was formally deposited in the Department of State on June 4, 1924, and

has been ratified by Arkansas, Arizona, California, and Wisconsin. It has been definitely rejected by both legislative houses of twenty-two states and by one house of the legislatures of eight states. Its fate is disclosed by the record. Opposition to the amendment did not come chiefly from the South. The result did not disclose a lack of interest in humanitarian measures in this country; it merely indicates that the people, through their state legislatures, have been impressed by the argument of the Supreme Court that such a proposal would invade the reserved powers of the states. The court used this argument to curb unconstitutional legislation; the people have used it to prevent an alteration in the fundamental law. The feeling is that the special sphere of the states has been invaded quite enough and that the Constitution should not be amended in keeping with the provisions of every new piece of unconstitutional legislation.

The Five-to-Four Decisions.—Much ink and paper has been used in attacks on the so-called "five-to-four decisions." In some quarters it has been suggested that Congress should pass a law forbidding the Supreme Court to hold an act of Congress unconstitutional by a bare majority, or by a five-to-four vote. Some have urged that at least seven of the nine justices should agree to a decision having this effect. The requirement, it is urged, would increase the confidence of the people in the court, and would cut down the number of laws held invalid. On the other hand, it is urged that the Supreme Court is a tribunal composed of men selected for their ability and distinction. Since it is so constituted, and has only nine members, the requirement of a vote larger than a majority on questions of prime importance is not necessary as in the case of the more numerous legislative bodies. An opinion of a justice of the Supreme Court is not analogous to a vote on a bill, treaty, or confirmation of appointment. Thus far in our constitutional life there have been only nine cases which have been held unconstitutional by five-to-four decisions; and an examination of the cases discloses that Congress has either attempted to invade the powers reserved to the states or to the people, or guaranteed to the individual, or to do something not authorized by the powers delegated to it under the Constitution. The measure would give a practical control of decisions to the minority. Unfortunately, these decisions have involved highly controversial social and economic questions, such as the rights of former adherents of the Confederacy, the income tax, child labor, the election of senators, and a minimum wage law.

Unconstitutional Legislation.—In addition to attacks on the five-to-four decisions, there has been much criticism of the Supreme Court

because of the legislation it has annulled. Prior to July 1, 1923, the Supreme Court had disposed of 29,310 cases. Within that period 44,-893 acts of Congress and hundreds of thousands of acts of state legislatures had been passed. The Supreme Court has declared forty-eight acts, or parts of acts, of Congress void in forty-nine cases. During the same period 375 state laws have been declared void. These forty-nine cases and statutes fall within five classes. Twelve involved the refusal of the Supreme Court to assume a jurisdiction conferred upon it by Congress but denied it by the Constitution; sixteen concerned acts of Congress which encroached upon the purely internal and domestic affairs of states; six involved acts of Congress infringing the constitutional and personal rights of individual citizens; seven concerned acts of Congress which sought to do the very things positively prohibited by the Constitution. The more recent acts have involved prominent statutes such as the Corrupt Practices Act, the Futures Trading Act, the Child Labor Laws, and the Minimum Wage Law. This summary does not disclose serious dangers which have been alleged to attend the right of judicial review. The Constitution has been the guide of the courts. It is not a political body, and it enjoys such authority and respect as the people have conferred upon it under their Constitution and laws. The province of the courts is to interpret the laws and to maintain a balance between the departments and jurisdictions of the government established by the founders. Chief Justice Taft pointed out that the insidious feature of much unconstitutional legislation rested in the fact that many good people were induced to support its commendable objects, forgetting that it could not be approved in many cases without invading the principle of local self-government, or of the powers of Congress, and without destroying the balance between them provided in the Constitution.

The Conventions of the Constitution.—There has been much comment on the written character of the American Constitution and on the unwritten character of the English Constitution. The idea of the written constitution denotes an instrument recorded in a single document and beyond the reach of legislative change, while the term unwritten signifies a multiplicity of statutes, judicial decisions, and other measures which may be changed either by ordinary legislation or by the introduction of new practices. This distinction is being qualified and even rejected more and more by writers on both the American and the English systems of government. These terms have been described as legal jargon, and the classification which they imply as incorrect. Mr. Herbert W. Horwill, in his interesting book entitled *The*

Usages of the American Constitution, has presented a view of our fundamental laws which is making headway both in England and in America. He rejects the usual contrasts between the English and American constitutions as false, and points to the influence of usages on the Constitution of the United States. By applying Dicey's analysis of the English Constitution to the American instrument, Mr. Horwill has pointed out that the law of our Constitution is made up: first, of the fundamental law, consisting of the Constitution of 1787 as subsequently amended (minus amendment 18); second, of the statute law of the Constitution; and third, of the common law of the Constitution. Coördinate with the law of the Constitution, he sets forth the conventions of the Constitution, which he describes as those customs, practices, maxims, or precepts which are not enforced by the courts.

One of the usages of the Constitution has to do with the election of the President of the United States. It was the intent of the framers to remove the President from the people as much as possible. Accordingly, the method of election provided in the Constitution was an indirect one, and it becomes more and more so under certain conditions. Each state was to appoint, by whatever means its legislature might direct, electors, equal in number to its total representation in Congress. Congressmen or officials of the government were excluded from appointment. The electors were to meet in their respective states and ballot for two persons, one of whom should not be an inhabitant of their own state. Balloting was to be secret, and the votes were to be forwarded to the seat of government for counting. The person having the highest number of votes should be President, and the next highest, Vice-President. After 1804 electors voted separately for President and Vice-President. The original plan stipulated that in case no one received a majority of the total number of electors, the House of Representatives should elect a President from the five highest on the list. After 1804 the number was reduced to three. The plan, of course, was to make the election unmistakably an indirect one. By the terms of the Constitution the state legislatures might direct the manner of appointment. There might conceivably be forty-eight different methods of choosing the electors. Several methods were at first tried. Selection by the state legislatures was the most general practice. In the course of time it became the general custom to choose them by popular vote. Opinion was divided as to whether the election should take place by the general vote of the people of the state, or by districts. Most of the states elected by a

general ticket. In all of the states today presidential electors are popularly chosen. The method is an example of a prevailing usage unauthorized by law and not intended by the framers of the Constitution. The presidential electors have, therefore, lost all the discretion contemplated for them by the earlier statesmen; and while there is no definite pledge to respect their party instructions save in the State of Oregon, a failure to do so would result in penalties more exacting in a political way than anything which might reasonably be imposed by law.

Mr. Horwill has pointed out that the succession of a vice-president to the presidency left vacant by the death of its occupant is the result of usage and not of constitutional provision. He has indicated that the passages of the Constitution providing for filling the presidential office in case of vacancy mention who shall *act as* President, but do not mention who is to *be* President or to *become* President. By a thorough analysis of these clauses he has attempted to show that successors to the presidential function have become *acting* presidents by constitutional design and *actual* presidents only by practice. He summarizes his point as follows:

(1) The fundamental law of the Constitution recognizes two and only two ways by which anyone may become President of the United States; namely, (a) choice by the electors, and (b) choice by the House of Representatives on the failure of the electors to give the requisite majority to any candidate. (2) It admits of no "presidential succession" except the following of one elected President by another elected President, either immediately or after an interval. (3) It provides that the duties and powers of the President, in the event of a vacancy occurring during a Presidential term, shall devolve upon the Vice-President, and it does so in language so carefully guarded as to preclude his being considered to have thereby become President. (4) It makes similar provision for the carrying on of the government during the inability or disability—the framers of the Constitution use either term indifferently, evidently regarding the two words as synonymous—of the President. It contemplates the possibility that this inability will be only temporary, in which case the President will presently resume his functions and the Vice-President will go back to the performance of the duties of President of the Senate. (5) It makes it clear that the assumption by the Vice-President of the responsibility of discharging the President's duties creates no vacancy in the Vice-Presidency, but results only, as far as that office is concerned, in the appointment of a substitute to preside over the Senate. (6) This conception of the status of a Vice-President called to the White House is consistently maintained in three different sections of the text of the fundamental law, widely separated from

one another, and there is not a line in the document that gives even the faintest shadow of support to any other theory.[1]

The third-term doctrine is a part of the unwritten constitution. At first seven years was voted by the Constitutional Convention as the term of office. Some were opposed to reëlection. Later on the matter was reconsidered and the term of four years was agreed upon. The question of reëlection was discussed, but nothing about it appears in the Constitution. The third-term doctrine is ascribed to George Washington. He opposed his reëlection for a second term in 1792, and argued that a rotation in elective offices was more in harmony with the ideas the people had of liberty and safety. The demands of the country, however, dictated a second term. In 1796 he refused to run again. It is a mistaken view that he objected to a third term on grounds of principle. His attitude was based on personal reasons only; he hoped that he might enjoy that retirement from which he had reluctantly withdrawn in the interest of public service. The dangers facing the country on previous occasions, however, did not now exist. He declared: "I rejoice that the state of your concerns, external as well as internal, no longer renders the pursuit of inclination incompatible with the sentiment of duty or propriety, and I am persuaded, whatever partiality may be retained for my services, that in the present circumstances of our country, you will not disapprove my determination to retire." Jefferson refused to become a candidate for a third nomination in 1808. Jackson similarly refused in 1836. There was a considerable demand for the election of President Grant for a third term in 1876. The House of Representatives passed a resolution condemning the proposal, and the Republican Convention refused to make the nomination. In 1896 Cleveland retired from the presidency after serving two terms and after standing for election three times consecutively. The Democratic Convention of that year declared it to be the unwritten law of the Republic, established by convention and custom of one hundred years, and sanctioned by the greatest and wisest of those who had founded and those who had maintained the government, that no man should be eligible for a third term of presidential office. Theodore Roosevelt succeeded to the presidency in 1901, following the death of William McKinley. After his election in 1904 he declared: "The wise custom which limits the President to two terms, regards the substance and not the form, and under no circumstances will I be a candidate for

[1] Horwill, *The Usages of the American Constitution*, pp. 65–66.

or accept another nomination." In various interviews he confirmed this statement. He supported the candidacy of Taft in 1908. After his African trip, however, he returned to the United States to find the Taft administration proceeding along lines which were contrary to Rooseveltian policies. A number of Republican state governors urged that he stand again for nomination. He accepted their invitation and entered the lists as a candidate. In the Republican Convention he received 107 votes as against 561 for President Taft. He then became the candidate of the Progressive Party. Upon being criticised for seeking a third term he answered that his statement referred only to a third consecutive and a third elective term. The Democratic platform of 1912 committed the nominee of that party to one term. History has shown this provision, dictated by Mr. Bryan, to be a scrap of paper. It has been intimated that Mr. Wilson desired a third term in order to finish the work of reconstruction and to carry on the struggle for the League of Nations. What the attitude of the party and the country would have been in this case is a subject only for speculation. The death of President Harding resulted in the assumption of the presidency by Calvin Coolidge. Coming into power at a time when prominent members of his party were in public disgrace, including persons high in the counsels and in confidence of the former President, he was handicapped from the start. A sporting desire on the part of the American people to give every man a chance helped to remove this handicap, and resulted in his election by an overwhelming majority in 1924. The question has been raised as to whether or not he can or will, in view of our third-term theory, become a candidate for office in 1928. At the present writing this is also speculation. The third-term idea, however, is writ large in the minds of the American people, and political parties will hardly be unmindful of it in their future nominations for the office.

Another usage of the Constitution has to do with the cabinet. The framers of the Constitution intended that the Senate should act in the sense of an advisory council, consulting with the President in regard to the ratification of treaties and the confirmation of appointments. This consulting function has by practice devolved upon the cabinet. The Constitution provides that the President shall consult the heads of his departments. Washington regarded them as a collective body, and submitted problems of policy and administration to them for their consideration and advice. The American cabinet is, therefore, an unofficial body composed of the heads of the executive

departments, who are appointed by the President and are responsible and answerable to him. The practices of the different Presidents have varied in their relations with their cabinets. Washington required written opinions of the heads of his departments, and often solicited their collective advice on matters of prime importance. The holding of cabinet meetings became an established procedure. The President is not, under the law, required to consult with the members of his cabinet or even to call them together in a collective capacity. The practice of President Wilson was to meet with his cabinet and sometimes to discuss matters with them collectively, but more generally to take up departmental matters individually with each department head. Often he assumed personal charge of the affairs of a department. This was especially true of the Department of State. During the administration of President Harding the collective will of the cabinet was again manifested. The President left to the heads of departments the direction of their affairs, and consulted with them as a cabinet in regard to general policies of government. The Vice-President became a regular attendant at the cabinet meetings during the Harding administration. The large discretion vested by Harding in the members of his cabinet was completely justified in the case of such outstanding men as Hoover and Hughes, but it resulted disastrously in the cases of other men, especially those entrusted with the administration of the Department of the Interior, the Navy Department, and the Department of Justice. When Coolidge became President, and the disclosures of alleged maladministration in regard to oil leases were brought to light, his opponents charged him, not with guilt or collusion, but with guilty knowledge, in view of the fact that he had attended the cabinet meetings where such matters had been fully discussed. Since that time the Vice-President has not attended cabinet meetings, fearing that such attendance might make him a party to a discredited régime in case of his elevation to the presidency. Under the law his opinion as Vice-President could have no weight, except as the President should approve.

A further usage has to do with the power of appointment and removal. The Constitution briefly sets forth that the President shall nominate and, with the advice and consent of the Senate, appoint certain designated officials, and all other officials of the United States whose appointment is not otherwise provided for. The term "advice" relates to the completion of the act of appointment which the President definitely shares with the Senate. Does it also cover the initial step of nomination, or is this left exclusively to the President? Wash-

ington took the initiative by submitting his appointments to the Senate without previous consultation. The power of nomination is expressly limited by the practice of allowing senators and representatives to name candidates for positions. Many posts are regarded as legitimate spoils of office and as rewards for party service. It is one of the ways in which politics is made profitable. While the practice is often criticised, little is done or can be done to limit it. Then, too, the President must make use of his patronage in the best possible way to insure the success of his administration, and his measures. A certain amount of trafficking between the President and Congress is always carried on in order to win support for the policies of the administration. It has been the usual practice of the Senate to confirm the President's appointments, especially his cabinet nominations. To this general rule, however, there are a few interesting exceptions. In 1925 Charles B. Warren was nominated as candidate for the post of Attorney-General. It was freely admitted that the President might select his own official family, and that the practice of submitting their names to the Senate was a matter of form. The President, in a statement, requested that the practice of three generations of permitting the President to choose his own cabinet not then be changed, and that the opposition to Mr. Warren be withdrawn in order that the country might enjoy his excellent services, and in order that the President might be unhampered in his choice of the methods of executing the laws. The appointment was again sent to the Senate. The first rejection had been by a vote of 41 to 39, but the second was by a vote of 46 to 39. Mr. Warren, in order to relieve the President of further embarrassment, refused the offer of a recess appointment. The President's nomination of another man was immediately approved. This was an exceptional case. The Attorney-General is the legal advisor of the President and is also the head of the Department of Justice, having in his charge the administration of justice throughout the country. His discretion in regard to personnel, policies, and prosecutions under the federal laws is wide. Mr. Daugherty had been dismissed by President Coolidge as Attorney-General. The Senate did not want to make another mistake. Mr. Warren had been connected with the sugar trust, which had been charged by the Federal Trade Commission with having engaged in a conspiracy for the restraint of trade. Should the Department of Justice be entrusted to a man of such connections, whose business was to enforce the laws against business combinations of this type? It was the view of the Senate that the personal and professional connections of Mr. Warren with this business were so great

that his enforcement of the federal laws applying to it might be influenced thereby.

The power of removal has by practice come to be exercised by the President alone. Of course Congress can and does share in the process of impeachment, which is a judicial process and can be invoked only for cause. The Senate, however, in recent years has taken an interest in the retention or dismissal of government officers, especially cabinet members, where the President's discretion to dismiss is fully as great as his discretion to appoint. On February 11, 1924, the Senate adopted a resolution requesting the President to ask immediately for the resignation of Secretary of the Navy Denby, by reason of his official connection with the Tea Pot Dome scandal. The minority in support of the President made the point that it was executive business altogether, and that the process of impeachment was the only method open to the Senate in the case. The majority declared that the Senate, in sharing with the President the matter of appointment, had the right to communicate to the President that the Secretary of the Navy no longer had its confidence. Some of the members insisted that the Senate, having the right and the duty to give its consent, had the incidental and supplementary right to withdraw its consent when once given. The President, in a statement, declared: "The dismissal of an officer of the government, other than by impeachment, is exclusively an executive function. I regard this as a vital principle of our government . . . the President is responsible to the people for his conduct relative to the retention or dismissal of public officials. I assume that responsibility." Secretary Denby soon resigned and Curtis D. Wilbur was nominated and confirmed as his successor.

The President's power of removal has been definitely confirmed by a recent decision of the United States Supreme Court (*Meyers v. U. S.*, 47 Sup. Ct. 21). By this decision Congress may not, by statute, prevent the dismissal by the President of anyone whom he has appointed to the executive departments. The appellant had been appointed by President Wilson to the office of postmaster of the first class at Portland, Oregon, for a term of four years, with the advice and consent of the Senate. The federal statute governing the case provides that "Postmasters of the first, second, and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate and shall hold their offices for four years unless sooner removed or suspended according to law." President Wilson removed Mr. Meyers from office without the consent of the Senate. Meyers sought to recover his salary from the time of his dismissal.

The majority of the court, in supporting the exclusive right of the President to remove independently of the Senate, held: (1) that the power to remove was essentially an executive function, which would have been limited by the framers of the Constitution, had they so intended; (2) that the constitutional power to appoint carried with it the incidental power to remove, and the required concurrence of the Senate in certain appointments could not be extended to cover removals; (3) that the right of the Congress to vest the appointment of inferior officers in the courts or heads of the departments, as well as in the President, affected the power of removal only as such appointments were denied to the President; and (4) that the constitutional mandate of the President that he shall execute the laws made necessary his control over subordinates in the executive family. Chief Justice Taft gave the opinion of the court. Mr. Justice Holmes, in a dissenting opinion, declared that, in view of the fact that the office owed its existence to Congress, that body might stipulate a life term free from interference as well as it could abolish the office. Mr. Justice McReynolds also dissented. Since the government is one of limited and enumerated powers, he said, "nothing short of language clear beyond serious disputation should be held to clothe the President with authority wholly beyond congressional control arbitrarily to dismiss every officer whom he appoints except a few judges." While the removal of an officer is an executive act, the prescribing of conditions for removal is legislative. Mr. Justice Brandeis also dissented, holding that the Congress, under its constitutional right to provide for the appointment of inferior officers, could fix the term of tenure. The court gives definite support to the growing authority of the President. The abuse of the power might demoralize our civil service, and strike at the heart of our merit system. Should this result, Congress could vest the power of appointment in the heads of departments, and could limit the right of removal.

The power of the government in money matters, as provided in the Constitution, has been modified by usage. The control of national finances is vested in Congress, which has the general taxing power, the right to pay debts and to provide for the common defense and general welfare, and the power to borrow money on the credit of the United States. Bills for raising revenue originate in the House of Representatives, but the Senate may propose or concur with amendments as in the case of other bills. The primacy of Congress as a whole in the matter of financial legislation is modified by practice in several ways. In the first place, treaties are often made by the President, with

the advice and consent of the Senate, involving an appropriation; and it is the custom to follow such treaties with the necessary supplementary legislation carrying the appropriation. While the subsequent act of Congress is a formal ratification of the treaty provision, the initial step in expenditure has been taken first by the President in negotiating the treaty, and second by the Senate in ratifying it. Again, the framers of the Constitution intended to reserve to the House of Representatives the special function of originating revenue bills. The constitutional right of the Senate to propose or to concur with amendments has had the effect of placing the Senate in practically the same position as the House of Representatives in this regard. The power of amendment is unlimited, and in any case the measure cannot become a law without the consent of the Senate. Thus the special function of the House of Representatives in this regard has practically been broken down. The power of Congress in matters of legislation has given it a certain whip-hand over the President which was not intended by the framers of the Constitution. Financial control should, they thought, be vested in Congress. It was not intended as a weapon to be used against the President. Congress often attaches to appropriation bills measures which would otherwise receive the presidential veto. The wheels of government must revolve, and to that end legislative appropriations are necessary. Unless the President is willing to bargain with Congress in regard to measures which he opposes, the legislature may force his hand in this manner. While the practice has been somewhat discredited, it still has a certain vogue in the United States.

Another usage of the American Constitution has to do with the residence of the members of the House of Representatives. Should they be residents of the district in which they stand for election, or should they be residents merely of the state in which their district is located? The qualifications of representatives are laid down by the Constitution, and the House of Representatives is its own judge as to whether or not these qualifications have been met in a given case. The only geographical limitation in the Constitution is that the representative must be an inhabitant of the state in which he is chosen. The division of a state into congressional districts is not required. The only alternative would be the election of congressmen-at-large on a state-wide ticket, or the division of the state into congressional districts with candidates standing for election in any one district, even though residing in another. The requirement of the residence of a congressman, with the geographical limitation of his district, is purely a matter of practice. While it is conceivably possible for a non-resident

to stand for election, having otherwise met the qualifications, the tradition of residence is too strong to permit such a result. The English practice of allowing a non-resident to stand for election in any parliamentary district where he can command a reasonable amount of support, would have distinct advantages. Moreover, the election of congressmen-at-large on a general state-wide ticket would have the effect of raising the level of men who would run, of enlarging the scope of the people's choice, and of eliminating the ever-recurring desire of the people to secure through their congressmen an increasing amount of appropriations from the national treasury. More than anything else, it would aid in ending the notorious pork-barrel régime.

What is the American Constitution?—The term constitution is not limited to the provisions of the written instrument. We have one Consitution as it came from the hands of the framers and as it has been added to by amendment; this is clearly the formal or written Constitution. There is another constitution which has come to us through judicial decisions. This is a part of the formal Constitution, but may be regarded as the law of the Constitution. Another part of the Constitution is based upon political usage, and includes the rise of political parties, and various practices outside the realm of law which have grown up about the instrument and which have more or less determined its operation and spirit. These practices are often called the custom of the Constitution, the unwritten Constitution, or the conventions of the Constitution. Some contend that the Constitution is judge-made law; and there is no doubt that judicial opinion has had much to do with constitutional interpretation and application. The training, political philosophy, and point of view of the judiciary must of necessity flavor their opinions, as they would influence the decision of any one in a similar position. The guides which they have used in a sense give a key to the workings of their mind. The common law, the law of nature, the *Federalist,* the use of terms by the first Congress, notable acts of Congress, and the debates of the Constitutional Convention, have been used as aids in arriving at the meaning of the Constitution. Some guides have been used more than others, but no one guide has been used to the exclusion of others. In general, the courts have used what, in their opinion, constituted the most reliable means of expounding the Constitution. It is the function of the judicial department to determine what the law is; but the use of the proper means to reach that determination is not and should not be limited. In a word, the Constitution has been the guide of the courts. Sometimes, theories of government and law may have influenced con-

stitutional interpretation. Certainly the decisions of Marshall and Taney were dictated by their respective political philosophies, and by their leanings toward a definite view of the nature of the Union and the functions of the federal and state governments. But the Constitution was not designed to give effect to a theory or to several theories. It is an instrument of government, the purpose of which is to make the community life of the nation more efficient and more effective. The Constitution is dynamic, and may be changed by the means provided if expansion or contraction is required. It may be changed in any manner within the limits contained in the instrument itself. The general principles of the Constitution, in spite of the extra-constitutional practices which have grown up about them, have remained the same during almost a century and a half of our constitutional life. Such principles include the doctrine of a limited government, of delegated powers, of the supremacy of federal law, of the protection of private rights, of the separation of powers, of judicial supremacy, and of constitutional guarantees. Whatever changes are made, it is unlikely that these basic principles will be seriously affected.

II. The State Constitutions

The States and the Constitutional Convention.—The Articles of Confederation may be regarded as an arrangement devised for purposes of convenience, from which the states might withdraw at will. The states retained every sovereignty, independence, and power not expressly delegated to Congress. Even the powers so delegated were ineffective, since a state could not be persuaded, and much less compelled, to put its own machinery in motion to facilitate or even make possible their execution. The demand for a "more perfect union," as we have seen, was an answer to the obvious defects of this system. The instructions, both of the Congress and of the states, to the delegates, authorized only a revision of the Articles, with a view to making them adequate to the needs of the Union. The question of whether a national or federal government should be established was fully discussed. Madison wanted some restraint on the government of the states, especially the state legislatures. Hamilton regarded strong state governments as a menace to the Union, due to the conflict of allegiances, and to the weighty rivals which the national government would have. Only a general attachment to the national government would prevail against such a combination. He would therefore reduce the states to the position of mere units in the federal system. Luther

Martin contended that the nationalists and the representatives of the large states had combined to make a union which entirely ignored the rights of the small states. William Paterson desired that the Convention should make such an instrument as it was authorized to make, and as the people would approve. Equal sovereignty, he said, was the basis of the Articles of Confederation; it should govern the members in their deliberations, and should find a place in the Constitution. Edmund Randolph favored an instrument which would give all power to the Congress where the states were incompetent to act, or where the public interest should dictate. Some of the plans suggested the control of the states through veto power vested in the national government. The Hamilton Plan, which from the standpoint of basic changes was the most radical plan proposed, suggested that all state laws contrary to the Constitution or laws of the United States should be utterly void. In order to discourage their enactment, the state executives should be appointed by the general government, and should have a negative on all laws about to be passed by the state legislatures. In time it was agreed that the Congress should exercise exclusively the ordinary sovereign powers necessary for the maintenance by the Union of membership in the family of nations, and that certain limitations should be placed on the states, in addition to the powers delegated to the Congress, which would prevent the state legislatures from interfering with the defined sphere of the national government.

Constitutional Limitations on the States.—The states are not permitted to interfere with the national currency system. The problem of the debtor and his relief was a matter of special solicitude with the early state legislatures. Sympathy was extended to the debtor, even through the relaxation of the administration of justice, and through provisions for the payment of debts. Paper money was issued by the states, so that debtors might easily discharge their obligations. Accordingly, the Constitution provided that no state should coin money, emit bills of credit, or make anything but gold and silver coin legal tender for the payment of debts. States might charter banks, which in turn might issue notes for circulation, although states might not do so directly. A federal tax of ten per cent laid on these notes in 1866 had the effect of virtually retiring them. This constitutional provision was inserted in the interest of maintaining a sound currency.

The state legislatures, in some cases, did not regard seriously the contractual rights of creditors. Laws were passed suspending the collection of debts, authorizing debtors to pay their obligations with

land or personal property, repealing the charter of a college and taking its management from the trustees appointed by law, and interfering generally with the enforcement of private agreements. The states were therefore forbidden to pass any law impairing the obligation of contracts. The clause was probably directed against repudiating states as well as against parties to private contracts. Marshall interpreted it as applying to private contracts, and so gave the Supreme Court jurisdiction over a multitude of local questions. The decisions of Marshall on the contract clause are discussed in the preceding section.

Relations of the states with foreign nations are forbidden, and their relations with other states are regulated by the Federal Constitution. No state may enter into "any treaty, alliance, or confederation." Moreover, agreements or compacts cannot be entered into between states, or between a state and a foreign power, without the consent of Congress. States may not engage in war unless invaded or unless in such imminent danger as will not admit of delay. States may not maintain troops or ships-of-war in time of peace without the consent of Congress. Agreements between a state and a foreign country, even with the consent of the Congress, are unlikely. Agreements or compacts between states are often desirable. The most notable example is the Colorado Compact, entered into by the several states included in the basin of the Colorado River, with the consent of Congress, for the distribution of water and power rights. The compact required the ratification of the several legislatures of the basin states.

The taxing power of the states is constitutionally limited, not by an express provision, but by the right given to Congress to lay certain kinds of taxes. Tariff duties (imposts, or duties on imports and exports) may be laid only with the consent of Congress, except for the enforcement of the state inspection laws. Indeed, exports cannot be taxed at all, and Congress has the sole authority to pass import duties. All state laws on the subject may be revised by Congress. States may not levy a tonnage tax without the consent of Congress. By decision of the Supreme Court the power to tax, which is also the power to destroy, may not be used by the states so as to impair or destroy the usefulness or effect of any agency of government. There fore, national property, and lawful national agencies and instrumentalities, may not be taxed by the states.

States can not seriously interfere with interstate commerce. The Constitution gives Congress the right to "regulate commerce with foreign nations and among the several states, and with the Indian

tribes." Intra-state commerce, which begins, runs its course, and ends within a certain state, is within the jurisdiction of that state alone. When commerce goes beyond the borders of a state, it falls within the jurisdiction of Congress. Our continental development, our extensive railway systems and steamship lines, have greatly increased the necessity of regulation. The commerce clause today covers many matters not thought of by the Founding Fathers, and it has helped, probably more than any other clause, to break down the barriers of state lines in the United States.

While the full guarantees of the bill of rights operate only against Congress, certain limitations are imposed on the states in regard to criminal legislation. The states are forbidden to pass bills of attainder, which are legislative acts inflicting punishment without judicial trial. They restrict the infliction of a penalty to its proper place—the courts rather than the legislature. Nor may a state pass an *ex post facto* law. The Supreme Court has defined *ex post facto* legislation as follows:

> . . . every law that makes an action done before the passing of the law, and which was innocent when done, criminal and punishes such action; every law that aggravates a crime, or makes it greater than it was when committed; every law that changes the punishment and inflicts a greater punishment than the law annexed to a crime when committed; and every law that alters the legal rules of evidence and requires less or different testimony, than the law required at the commission of the offense, in order to convict the offender.

The supremacy of federal law, and the control of the judiciary, are guaranteed by the Constitution. In order to maintain this supremacy, both in regard to positive grants of power and in regard to limitations on the states, and to provide for their effective enforcement, it was stipulated that "this Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made, under authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." State officials are required to take an oath or affirmation to support the Constitution of the United States. The Federal Constitution and laws, to the extent of their lawful operation, work as a general limitation on all of the states.

The second sentence of Section I of the Fourteenth Amendment provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'' The privileges and immunities so protected are few and simple, and include only such rights as exist in the government, its national character, or its Constitution. They must flow from citizenship in the United States in order to enjoy this protection. It was not intended, said the Supreme Court, to bring within the power of Congress or the jurisdiction of the Supreme Court ''the entire domain of civil rights heretofore belonging exclusively to the states.'' General civil liberties are still within the control of the state governments. The most important limitation is that which forbids deprivation by the states of life, liberty, or property without due process of law. The term ''due process of law'' has been discussed above. Life, as used here, means not only physical existence, but the faculties and manifestations of life as well. Liberty means the right to do as one likes within the limits of the law, and an immunity from the unlawful and unreasonable restraints of government on one's personal conduct. It has been interpreted as a liberty to contract. Property embraces any legally acquired form of vested right or interest. The term ''due process of law'' is difficult to define, since its meaning depends entirely upon the nature of the various situations to which it is applied. It has often been identified with legal proceedings conducted according to the rules and principles established by the Constitution and by the common law. Under the Fifth Amendment and under the state constitutions the term was applied to procedural limitations rather than to limitations on the substantive powers of legislatures. The Fourteenth Amendment changed this interpretation. It was intended that the legislation of local bodies should be reviewed by the federal courts as it affected the protection of persons and property. Today it means the prevention of arbitrary legislative and administrative acts on the part of the states, and the prevention of the invasion of the fundamental rights of citizens. Much local legislation is therefore brought within the scope of the federal courts which was formerly exclusively under the control of the states.

Constitutional Privileges of the States.—The states, under the Constitution, are guaranteed certain rights and privileges by the federal government. Each state is assured of at least a measure of control over its status, especially its territorial extent. No state may be formed or erected within the jurisdiction of another state, or formed by the junction of two or more states or parts of states, without the con-

sent of the legislatures of the states concerned and of Congress. A state's existence is therefore definitely guaranteed.

The United States guarantees to every state in the union a "republican form of government." In the minds of the framers of the Constitution this was essentially worthy of preservation. Under the Articles of Confederation it was seen that the state governments might be threatened, and even destroyed, owing to their lack of protection by some superior force or authority. The states had surrendered, in many respects, the control of their own destinies. The national government could assume, in return, only a fair measure of protection. But the forms must be "republican." The Constitution does not define the term, but the Supreme Court has indicated that the framers reasonably had in mind the general type of government existing in all of the original states. All of them had constitutions at the time, which did not change upon the ratification of the Federal Constitution; and from these instruments we must gather what was "republican" within the meaning of the Constitution. Both the state governments and the national government were regarded as comprehended by the term. The power to determine what is a republican government rests with the national government, which must judge of the fact of a non-republican government, as also of the means to preserve a republican form in any of the states. There is as yet no precedent on the question. The interference with the form might come from within or from without the state, or from a condition entirely beyond the power of the state to control. Congress may, by refusing seats to the representatives and senators of states deemed to have non-republican institutions, penalize them until the defects are corrected.

Invasion and domestic violence are two further conditions against which the states are protected by the national government. Each state is protected against invasion absolutely and at all events. The invasion of a state is also an invasion of the Union, and as such will be repelled by all the resources of the United States. The states have no existence internationally, and are expressly limited in their military operations. The federal government has therefore assumed for them responsibility for their security. The consent of the state is not necessary, in cases of invasion, in order to invoke the constitutional guarantee. The case of domestic violence is somewhat different. The protection of the national government must first be requested by the state legislature, or by the state executive when the legislature cannot be

convened. The violence, generally speaking, must have reached a stage where the power of the state is inadequate to deal with it. Sometimes the executive and the legislature of the state may be at loggerheads over the question of inviting federal intervention. In any event, if the agencies, functions, or interests of the federal government are imperiled, the President may, without the request of the state, or even against its will, intervene to quell the violence.

Constitutional Provisions as to Interstate Relations.—The doctrine of the sovereignty of the several states of the Union, in whole or in part, passed with the Civil War; yet there is a supremacy of each state within its own sphere which cannot be disputed. In the states of the Union, as in the case of members of the family of nations, territory and jurisdiction are co-extensive. Each state legislates for itself alone, and its officers administer and enforce its laws within its territory. Certain obligations must be assumed in order that the neighborhood of states may get along together; and these obligations must be common to all and must have a uniform application. They may be imposed by constitutional mandate, by definite agreement, or by practice. The Constitution requires that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." This clause relates to civil decrees and judgments. Such judgments, upon the presentation to the proper authorities of the neighboring or other state of an authenticated copy of the official record, must be enforced. The usual business, domestic, and legal relations fall within the same category. Deeds, contracts, marriages, wills, and other matters of record are included. Unless this were so, each state would be a haven of escape for delinquent persons who would take advantage of a change in jurisdiction to escape their financial obligations. It is also provided in the Constitution that the "citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." This means that a citizen of Massachusetts, upon arriving in California, enjoys the rights of California citizens. The right to vote or to hold office are not included in this guarantee. It is within the right of each state to fix its own conditions for suffrage and office-holding. The guarantee does extend to the usual civil rights of citizens, such as the right to contract and carry on business, to practice professions or occupations within the limits of the law, to have recourse to the courts, the right of sojourn, travel, and residence, and freedom from discriminations in matters of taxation. Further, the Constitution declares that "A person charged in any state with treason, felony, or other crime, who shall flee

from justice, and be found in another state, shall, on demand of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." Professor John Bassett Moore, who for a number of years administered the extradition agreements for the United States, applied the term "interstate rendition" to the exchange of prisoners between the states of the Union, for the reason that the term "extradition" refers to agreements of the same kind between sovereign states. The process of international extradition, based on treaties, is described elsewhere. The rules governing the international practice do not necessarily extend to the state practice. The procedure is simple. A person guilty of "treason, felony, or other crime," who escapes from one state into another, may be arrested upon the request of the authorities of the first state. A requisition will be sent by the governor of the state of the first jurisdiction to the governor of the state of refuge, together with a certified copy of the indictment. It is within the discretion of the governor of the state of refuge either to honor or to refuse the requisition, as he desires. Nothing can compel him to honor it. It may be refused for any number of reasons, which must be accepted by the authorities of the requesting state. There are a number of such cases on record. The constitutional provision and the statutes covering the subject point to the duty of the executive of the state of refuge to deliver, but no provisions have been made for the enforcement of the duty. Until this is done, comity between state executives must govern. A fairly consistent practice has grown up in the exchange of persons charged with crime, in spite of the absence of an enforcement provision either in the Constitution or in the statutes.

How the State Governments are Similar.—There are now forty-eight states in the Federal Union. Each state has its own constitution and laws. Each state, occupying a different section and territory in the country, serves the needs of a different group. Diversities abound in regard to social and economic conditions. No state duplicates another in any particular. The state constitutions perhaps present fewer differences than is commonly supposed. These fundamental laws of the states, subject to the same general Constitution, performing in the main the same functions, and organizing governments of equal legal status, contain a number of features which are common to all. Where the differences are great, they are local to a certain situation, and are not capable of general duplication. In fact, there has been less originality in state governments than in any other branch of our political system. The opportunity for a mere reproduction of what

has gone before increases with the number of political units of the same kind. In the case of the federal government, where our statesmen have been compelled to strike out boldly along new and independent lines, definite contributions have been made to political science, and a real philosophy of government has been developed. In our state and local governments we have little more than a set of practices which are for the most part common to all, and we have developed little political philosophy concerning them. It may be because we think less philosophically and less originally about those things which are about us and close to us. It cannot be because the local governments are less important. The probable reason is that the problems of national government are more interesting and more inspiring. Indeed, the governing of a state is a far simpler process than the governing of the nation.

Of the points of uniformity, that of a republican form of government stands first. This is a guarantee of the Federal Constitution. The powers of the states are inherent and reserved; they are not delegated, as in the case of the national government. In this respect the powers of the state governments are more extensive than those of the federal government. The constitution of each state, like that of the Union, is written, and partakes of the nature of all written constitutions. The executive of each state is a Governor, chosen by the people of the commonwealth. Each state legislature is representative in character, and its bicameral composition to some extent resembles that of Congress. The different departments of state governments are separated in the exercise of their functions, in deference to the American principle of the separation of powers. Moreover, these departments are provided with checks and balances, one against the other. There is a certain uniformity in party organizations throughout the country. The same parties function in the states and in the nation. The states have equal representation in the Senate of the United States, and this equality cannot be taken away without their consent. Legal equality is another element common to the states. Moreover, the same divisions are generally observed in the division of the states into units of local government. All such subdivisions are authorized in each case by the state government. So unimportant are the differences that an attempt to enumerate them, state by state, would be a dull and uninteresting performance.

The State Constitutions.—The first state constitutions were revolutionary documents. In the transition from the government of the colony under the crown to that of a state under the Articles of Con-

federation, the charters fell by the wayside, and constitutions sprang up in their places. The charters influenced the framing of the Constitution in some particulars, but there were certain radical alterations. The power of the executive was virtually destroyed. Except in Massachusetts and New York, the governor became a mere figurehead. Having previously embodied the power of the crown, he was stripped of his authority by the first constitutions. An elective legislative body was substituted for the old governor's council, which became the Senate, or smaller and upper house. The courts were made responsible to some popular organ of government, as the legislature. Qualifications were imposed for voting and for holding office. These were usually property qualifications, but sometimes they included religious tests. These early documents were short and brief—in striking contrast with many of the long and bulky state constitutions we now have. The elective principle was applied to most of the state officers, including administrative officials. The state legislature was enthroned as the bulwark of the people's liberties; it was to be the sovereign body of the state, and possessed in abundant measure the confidence of the people.

The state constitutions vary in length and in content. The fashion in many states to put everything into the constitution influences constituent assemblies to report constitutions of inordinate length, and causes legislatures and the people to be prodigal in the matter of amendments. But most of these constitutions contain similar general provisions, and have the same main divisions. Each state constitution has a bill of rights. It contains, in general, the fundamental rights which have been guaranteed to the people by the first eight amendments to the Federal Constitution, such as the right of trial by jury, indictment by a Grand Jury, and freedom of speech and the press. In some of the states there are limited variations from these basic rights, but they are not of great consequence. Again, each state constitution has a group of sections which provide for a separation of the powers of government, the organization of the government, the duties and functions of the agents of the state, and limitations upon the local governing bodies. Certain sections deal with the electorate and state elections. Some of the constitutions give special attention to the regulation of corporations and public utilities. In all of the constitutions there are clauses of a miscellaneous character which deal with many matters less susceptible of general classification than the foregoing.

The final sections of the state constitutions in each case deal with the subject of amendment. The simplest and most general method of

amendment is that of proposal by the state legislature and ratification by the people. A simple majority, or two-thirds, or three-fifths, are required in different states. Most of the states provide that a majority of all the votes cast at an election shall constitute a ratification; and most of them also provide that their constitutions may be amended by special conventions, composed of delegates elected by the people for that purpose. A third method of amendment is by the initiative petition. A certain percentage of the legal voters in some of the states may propose an amendment by petition, to be submitted to the people of the state for ratification. Thus the constitution may be amended without any intervention on the part of the legislature.

Popular legislation in the states, in the form of the initiative and referendum, has had a tendency to break down the distinction between state constitutional law and state statutory law. The same percentage of the electorate usually passes on constitutional amendments and on initiative measures. The degree of popular sanction is the same. The difference seems to lie in the form rather than in the substance. A state judge, elected by the people, will probably think twice before declaring an initiative measure, approved by the people, void because of its unconstitutional character. If the people should want the popular measure to prevail, the legal distinction would mean little to them, and the judge might be penalized at the polls for his consistency.

III. The City Charter

The charter of the city, says Professor William B. Munro, "is, in a sense, the constitution of the city." It is, in a word, an instrument for the organization of a municipal government. It is a document of ancient origin. The Town of London was a municipality which enjoyed certain rights and privileges, even though they were not embodied in a legal instrument. Like the English Constitution and the common law, they were customary rather than written, and were no less effective on that account. William the Conqueror confirmed such rights and privileges as he found, in the form of a *carta,* or charter. Other charters were granted, which were looked upon as grants from the king to certain communities, and often for a consideration. Such charters did not constitute corporations from the legal standpoint as we know them today. In some instances the Roman Law has profoundly affected the common law and the public law of England. The Romans had given their cities the status of corporations. In time the

concept was introduced into England, to denote the legal personality or entity having an existence separate from that of the citizens of the community. The document authorizing this corporate personality comes from the state. The people of the city make the charter; but the state legislature or the people lay down the rules for the government of the cities in their charter-making. Just as the corporation under English law is a creature of the crown, so the municipal corporation of the United States flows from and is a creature of the state. As such, it may form some organization through which it may make laws and provide for their enforcement; it may sue and be sued; it may purchase, sell, and lease land or other property; and it may be represented by its agent. The analogy between the charter of a private corporation and that of a municipal corporation is at best an imperfect one, but the two have several features in common.

The charter, as the constitution of the city, is its fundamental law insofar as it does not conflict with arrangements having a higher validity, such as the constitution and laws of the state within which the city is incorporated. It issues in the first instance from the legislature of the state, and is either granted directly or authorized. The creature of the document is the municipal corporation. Certain powers are vested in the agents of the corporation, and a form of government is usually arranged. The charter is not the original written instrument alone; it may be expressly amended by the voters of the community, or it may be changed by the laws of the state. In a word, the charter provides the form for the organization of city government, and the powers and duties of the corporation.

Charters vary greatly from city to city and from state to state. In dealing with an instrument of this kind, duplicated many times throughout the country, all that can be done is to discover the common features of charters and charter systems. The granting of charters has led to a development of methods of doing it. While the state legislatures are, almost without exception, made the sources of the charters, yet the state constitutions may prescribe the mode of granting them. The so-called "special charter system" deals with each community apart from every other community. Uniformity may or may not result from this procedure. What a city gets becomes more or less a matter of bargaining with the state legislature. The plan does admit of adapting the charter and the form and organization of the government to the local situation, and to the special needs of the people. The state may become, under this system, virtually the master of the cities receiving charters from it. A general plan of granting

charters may be devised, which reduces all cities to a common level, and the rules which apply to one apply to all. Thus charters must conform to the general laws of the state regulating them. The plan makes for justice and uniformity, and for a certain equality of treatment; but it ignores the great diversities of the cities of any state. In some states the cities are divided into classes, and all of those falling within a certain class are granted similar charters. Population is the usual basis of division. It has the faults of the general system, but in a lesser degree. Even cities within the same class may, by reason of location, environment, and economic and social interests, require entirely different charters. The celebrated "home-rule" plan is based on the thesis that the people should have greater scope in drafting their charters than the legislatures and constitutions previously allowed. Like the people of the states in the adoption of the state constitutions, the citizens of a city should determine their own government, save as it might be violative of the state constitution and laws. The scheme is in keeping with the principle of local self-government. The powers of the state legislature are restricted so as not to permit an unreasonable interference. An "optional charter system" provides several kinds of charters for cities which may apply for them, to be adopted by popular vote. These forms, as standardized, include the commission form of city government, the city-manager form, and the mayor-council form.

The city charters, like the state constitutions, vary in many points. But these points are unessential; there is even less originality in them than in the state constitutions. The fact that there are thousands of cities in the United States makes for duplication on a wide scale. What one city of a certain class will do, similar cities will do. Issues do not turn on great questions of policy. The functions of the city, while important, and touching the citizen directly as regards his physical and moral well-being, are not on so high a plane as the functions of the national and state governments. This explains in part why men lacking in ability and character can achieve a certain distinction in city governments when they could not even be considered for the higher services of the states or the nation.

A charter, in the first place, grants to the corporation, a "body politic and corporate," the usual corporate powers, and defines the boundaries of the city for purposes of convenience and jurisdiction. The electorate of the city is defined, and the powers of the electors in regard to the election of officials and the determination of issues are set forth. Popular legislation, in a number of cases, has included

the initiative, the referendum, and the recall. The departments and divisions of government are organized, and their relations are determined. This feature includes the executive, as the mayor, the council, the courts, the boards, commissions, and other officials and agencies provided for. An ordinance power is given to the city, to be exercised by the people through their agents, which authorizes the enactment and enforcement of legislation necessary to the welfare of the citizens. This extends to the police power, to taxation, to the civil service and administration, and to various other powers. The charter may regulate, not only the classes of legislation, but also the course or procedure which must be followed in its execution or administration. Other provisions of a general or special nature may be included. The foregoing statement embraces the general and essential features of American city charters.

A charter, like the Constitution of the United States, may be strictly or widely construed. The rule of strict construction has been more uniform than that of loose construction, and has come to be almost axiomatic. John F. Dillon, in his important book entitled *Municipal Corporations,* declared that such a corporate body possessed and might exercise the following powers, and no others: (1) those expressly granted; (2) those necessarily and fairly implied in or incident to those expressly granted; and (3) those essential to the realization of the objects and purposes of the corporation. A reasonable doubt as to the existence of a power under the charter, either express, or implied, or indispensable, is determined against the city, for the charter is construed strictly against the city, especially where it attempts to exceed the authority granted, or to assume a power not given. Judge Dillon also declared that "these principles are of transcendent importance and lie at the foundation of the law of municipal corporations." The principle of strict construction has thus become, in a sense, the law of the land. Professor Howard Lee McBain has pointed out, in his book on *American City Progress and the Law,* that this principle, like any other rule of law, gives an opportunity for some latitude in its application. What is a fair implication, and whether or not a power is indispensable, are questions admitting of wide differences of opinion. The rule, however, together with the minute enumeration of the powers of a city, has worked to complicate rather than to simplify the use of those powers. While the national and municipal governments represent the extremes in our governmental structure, yet both have definitely enumerated powers, and the national government—and in many cases the municipal gov-

ernments—has the power to make such laws as are necessary and proper to carry into effect these enumerated powers. The effect of the "necessary and proper" clause in the Federal Constitution has been to confer upon Congress many incidental powers. According to Marshall, any law designed to carry one of the specific powers into effect, is constitutional. The courts have deemed it essential to regard cities as corporations rather than as governments, and to construe their corporate powers strictly. The advantages of loose construction, applied to the powers of Congress in keeping with the growth of the nation, was denied to the cities, where change, within its smaller area and sphere, was perhaps as great, and elasticity in interpretation was as much needed. The rule of strict construction, therefore, has generally held, but it is, after all, in the words of Professor McBain, "a more or less variable thing in application." Under the "implied powers" of cities, flowing from those granted in charters, we find the power to grant franchises, to regulate public utilities, to own and operate public utilities, to expand a utility into the commercial field, to furnish a utility service beyond the city limits, and to engage in business of a collateral character.

The usual powers of the muncipal corporation fall under convenient headings. The corporate powers logically come first. The city is endowed, as in the case of private corporations, with a sort of theoretical immortality; it has a continuing personality, which is essential to the realization of its aims. While the life of a city may end, the concept of immortality is necessary to its continued progress. The city may also buy and own real and personal property. Almost every method of acquisition is open to the city, and almost every conceivable use if in keeping with the interests of the community. Every kind of property seems to be comprehended in the list owned by any large city. A city may sue and be sued. It therefore has rights and liabilities, and retains counsel to assert and defend its claims. A seal is used for legal papers and documents, and, in some cases, for decorative purposes. Meetings are authorized in order that the corporate business may be transacted. More important than the corporate powers are the powers of government conferred upon the city. Here the city really performs its function. The powers of government provide, in the main, for the execution of certain laws of the state, for the passing and enforcement of certain classes of local legislation (such as the public health, order, safety, peace, and welfare of the people), and for the establishment and maintenance of necessary municipal services (such as utilities and public works). The city occupies, in a

sense, a dual position. It is organized in order to provide for local needs; it functions for the benefit of its citizens and residents, and has a definite machinery of government, together with the necessary powers, to achieve this purpose. On the other hand, it is, like the county, a creature of the state, and may be a political subdivision or auxiliary of the state government for purposes of elections, law enforcement, or administration. Cities have retained a certain autonomy and independence in spite of this concept. To strip them of this power would make them mere units of the state system, and invest them with the deadening monotony of county governments, which are little more than state-controlled districts established for administrative purposes. Many of the city charters contain optional powers, which may or may not be exercised, according to the discretion of the municipal authorities. Charters have the almost universal fault of being loosely drawn. The members of the ordinary board of freeholders in the average American city are hardly men of the same ability, vision, experience, and public interest as were the framers of the Constitution of the United States. Where so many ambiguities exist, the courts have found it necessary to make some general rules for purposes of construction. Where a power is granted, and no responsible official is designated, the duty of exercising it devolves upon the council. This body assumes all powers not expressly assigned. Thus a responsibility is fixed for every power expressly delegated, and the supremacy of the law is established.

READING NOTES

The American Federal Constitution

For a general survey of the formation, development, and spirit of the American Constitution, together with illustrative materials, the reader is referred to Martin, C. E., *Introduction to the Study of the American Constitution* (1926).

The origin of the Constitution, as disclosed in British and colonial institutions, is important. The most recent and complete work, based altogether on colonial experience, is Breckenridge Long's *Genesis of the Constitution of the United States.* Further books on colonial institutions are: Bruce, *Institutional History of Virginia;* Meredith, *Maryland as a Proprietary Colony;* Shepherd, *History of Proprietary Government in Pennsylvania;* McKinley, *The Suffrage Franchise in the Thirteen English Colonies;* Lodge, *English Colonies in America;* Bishop, *Colonial Elections;* Fiske, *The Beginnings of New England;* Green, *The Provincial Governor;* Andrews, *Colonial Self-Government;* and Pownall, *Administration in the*

Colonies. A comprehensive idea of British institutions may be gained from the following: White, *The Making of the English Constitution;* Blackstone, *Commentaries on the Laws of England;* Bryce, *Studies in History and Jurisprudence;* Lowell, *Government of England* (II volumes); and Munro, *Governments of Europe,* chs. I–XIX.

For the making of the Constitution, the main source material is included in Farrand's three volumes on *The Records of the Federal Convention.* No student can be too familiar with these books. The *Federalist* remains today the leading treatise on the provisions of the Constitution as they were finally adopted. Other books dealing with the making of the constitutional system are: Bancroft, *History of the Constitution,* III volumes; Farrand, *The Framing of the Constitution;* Fiske, *The Critical Period;* and Beard, *The Supreme Court and the Constitution,* and *The Economic Interpretation of the Constitution.*

The sessions of the constitutional convention were secret, and no official records were kept. William Jackson, the Secretary, made no notable contribution in this regard. Farrand's compilation, noted above, is the best one. *The Documentary History of the Constitution,* published in five volumes by the Department of State, contains the notes of Madison and Yates, and other documents, including the official journal. Hunt and Scott have edited an excellent reprint, entitled *Debates in the Federal Convention of 1787.*

The development of our constitutional system is described in the following volumes: Haines, *The American Doctrine of Judicial Supremacy;* Burgess, *The Middle Period;* and Dunning, *Essays in Civil War and Reconstruction.*

A new trend in American constitutional discussion comes from an Englishman. Herbert W. Horwill, in his *Usages of the American Constitution,* points out the effect of usage on the American fundamental law; nor does he admit that the usual differences assigned to the British and American systems, as written and unwritten, rigid and flexible, logically apply.

In keeping with the present tendency to emphasize form and structure less, and the principles, function, and ideals of government more, the student is referred to Professor Merriam's *American Political Theories* and *American Political Ideas.* The provisions of the preamble to the Constitution are expounded by Professor A. N. Holcombe in his *Foundations of the Modern Commonwealth.* The institutions and political ideals of the United States, as institutionalized into practice, may be found in Bryce's *Modern Democracies,* Volume II. Students should examine Becker's *Declaration of Independence,* and McIlwain's *American Revolution* with much care. A complete understanding of the spirit of the Constitution cannot be gained apart from the writings and speeches of our statesmen who have had the largest part in its adoption, application, and interpretation.

The literature of constitutional law and history is enriched by two recent works of the first importance. They are: Warren, *The Supreme Court in United States History;* and Beveridge, *The Life of John Marshall,* four

in United States History, and Beveridge, *The Life of John Marshall,* four volumes. Mr. Warren's most recent work is *The Congress, the Constitution, and the Supreme Court.*

Compilations of cases on constitutional law have been made by Thayer, Hall, Evans, and Cushman.

The men who participated in the convention are described by E. G. Elliott, in his *Biographical Story of the Constitution.*

Mention should be made of works of a general character, as Norton, *The Constitution of the United States, its Source and Application;* Burdick, *The Law of the American Constitution;* Willoughby, *The American Constitutional System;* Beck, *The Constitution of the United States;* and Schuyler, *The Constitution of the United States.*

The advanced student will find his best source to be the *United States Reports,* in which are published the decisions of the Supreme Court of the United States.

The State Constitutions

For the constitutions of the states, the reader is referred to the handy compilation of Kettleborough, entitled *The State Constitutions.* The evolution of the state constitutions is comprehensively presented in Dealey's *Growth of American State Constitutions.* The National Municipal League has published a pamphlet entitled *A Model State Constitution.* Constitutional Conventions are discussed in Hoar's *Constitutional Conventions: their Nature, Powers, and Limitations.* Dodd's *Revision and Amendment of State Constitutions* is a recent work of merit on the general question of constitutional change. Textbooks on state government which give attention to state constitutions are: Holcombe, *State Government in the United States;* Dodd, *State Government;* and Matthews, *American State Government.*

The City Charter

The city charter does not enjoy a sparate literature as do the federal and state constitutions. The best books deal with the city as a body corporate. Dillon's *Commentaries of the Law of Municipal Corporations* (5 vols.) is the most exhaustive work. McQuillin's *Treatise on the Law of Municipal Corporations* may be mentioned in the same breath. Cases on the law of municipal corporations have been compiled by Beale, Macy, and Cooley. Two books by Howard Lee McBain should be read by every student interested in the fundamental powers of the city: *The Law and Practice of Municipal Home Rule;* and *American City Progress and the Law.*

City charters are treated fully in Mathews' *Municipal Charters.* Readings in municipal government, with some reference to charters, have been compiled by Wright and Maxey.

The leading work on municipal government generally is by William

Bennett Munro, *Municipal Government and Administration* (2 vols.). The charter is discussed adequately in this admirable work. The student is also referred to Munro's *Government of American Cities* (4th edition), which also treats of city charters.

A highly commendable work on city government generally, with some reference to charters, is Anderson's *American City Government.*

CHAPTER VI

THE EXECUTIVE

I. The President of the United States

Formation of the Executive Department under the Constitution.— We have already seen that the executive under the Articles of Confederation was really non-existent. The President of the Congress was merely a presiding officer. Executive functions as such were performed by the Congress itself, and such powers as were not conferred upon or assumed by the Congress were not exercised. In the estimation of the administrative school of revolutionary statesmen, the lack of an executive was what prevented the Articles of Confederation from functioning properly. It is quite clear that such men as Washington, Hamilton, and Franklin, accustomed to action rather than to theory, to performance rather than to promise, and to results rather than to discussion, should be impatient with the kind of government provided by the Articles of Confederation. The Founding Fathers had a free hand in constituting the executive department, and they determined to make the most of it.

The major plans for the organization of the government in every case gave attention to the executive department. The Virginia Plan proposed that a national executive should be instituted, to be chosen by the national legislature for a term of years and to receive for his services a fixed compensation which should not be increased or diminished during his term of office. Such an executive would be ineligible for reëlection, and would be vested with a general authority to execute the national laws. In addition, it was proposed that the executive should enjoy such rights as had been vested in the Congress by the Confederation. This plan would also have constituted the President a member of a Council of Revision, with power to negative laws of the national and state legislatures. The New Jersey Plan suggested a federal executive to consist of a certain number of persons and to continue in office for a certain number of years. Their compensation was not to be increased or diminished during their terms of office, nor were they to hold any other office or appointment while in service

or for a definite number of years thereafter. They also should be ineligible to reëlection, and might be removed by the Congress on application of a majority of the state executives. This plan would give to the executives a general authority to execute federal acts. They should appoint all federal officers not otherwise provided for and direct all military operations. They might not, however, take personal command of troops or act as military commanders in any capacity. The Pinckney Plan provided for a President to be chosen by the national legislature from among its members or from among the people at large. The President should be invested with the executive authority of the United States, together with the necessary powers and duties, and should have a right to consult with the heads of the different departments as a council. The Hamilton Plan vested the supreme executive authority of the United States in a governor elected to serve during good behavior. He should be elected by electors, chosen by electors, chosen by the people in election districts. According to Hamilton, the President should have: (1) a negative upon all laws about to be passed, and upon the execution of all laws passed; (2) the entire direction of war when authorized or begun; (3) with the advice and approbation of the Senate, the power of making all treaties; (4) the sole appointment of the heads or chiefs of the executive departments, such as finance, war, or foreign affairs; (5) the nomination of all other officers, including ambassadors to foreign nations, subject to the approbation or rejection of the Senate; and (6) the power to pardon all offenses except treason, which should not be pardoned without the approbation of the Senate. Upon the death, resignation, or removal of the executive, Hamilton would have vested this power in the President of the Senate until a successor should be appointed.

The political theory underlying the formation of the American executive and the arguments therefor are admirably set forth in the *Federalist,* Paper No. 70. It was declared that there was an idea prevalent that a vigorous executive was inconsistent with the genius of republican government. Such a proposition the authors of the *Federalist* refused to admit. A leading character in the definition of good government was declared to be energy in the executive. This quality was of primary importance for a number of reasons, such as the protection of the community against foreign attacks, the steady administration of the laws, the protection of property against interruptions of the usual course of justice through irregular and high-handed combinations, and the security of liberty against the inroads

of ambition, faction, and anarchy. The practice of Rome in vesting absolute power in one man, carrying the title of dictator, against the intrigues of individuals or groups, was indicated as a restraining influence against the foregoing tendencies. A feeble executive, it was declared, implied a feeble execution of the government. Feeble execution meant bad execution, and a government badly executed, whatever it might be in theory, must inevitably be bad in practice. Assuming that sensible men were agreed as to the necessity of an energetic executive, it remained only to inquire into the ingredients of energy and how they might be combined with other ingredients constituting safety in the republican sense. The ingredients constituting an energetic executive were declared to be unity, duration, an adequate provision for its support, and competent powers. The ingredients of safety, in the republican sense, were declared to be a due dependence on the people and due responsibility. This paper declared that the statesmen of sound views had put themselves on record in favor of a single executive and a numerous legislature. Giving power to a single hand was necessary to achieve this type of executive, while a numerous legislature is best adapted to deliberation and wisdom, and best calculated to secure the privileges and interests of the people and conciliate their confidence. Unity was declared to be conducive to energy in that the decision, activity, security, and dispatch of the actions of one man would result in strength, whereas the indecision, the dilatory tactics, and the divided counsels of a greater number would have an opposite result. This unity might be destroyed either by vesting the power in two or more magistrates of equal dignity and authority, or by vesting it ostensibly in one man who should be subject in whole or in part to the control and coöperation of others acting as counsellors to him. Both methods would have the similar effect of divesting the executive of the necessary qualities.

There was considerable discussion as to the form of the executive. The Convention was opposed to monarchy, in view of colonial experience under British rule. John Adams feared that the executive might in the course of time become a monarch. John Dickinson seemed to favor a monarchy, but realized that it could not apply to the United States. Under the Virginia Plan the veto power was given to a Council of Revision, which, from the standpoint of this function, was to be a plural executive. The New Jersey Plan was definitely in favor of the plural executive, while Hamilton favored a single executive to serve during good behavior. James Wilson made certain interesting comparisons in regard to the Virginia and New Jersey proposals. In

the Virginia Plan, he said, a single executive magistrate was at the head, whereas in the other a plurality was held out. In making this contrast he expressed his views, according to the notes of James Madison, as follows: "In order to control the legislative authority, you must divide it; in order to control the executive, you must unite it. One man will be more responsible than three. Three will contend among themselves until one becomes a master of his colleagues. In the triumvirates of Rome, first Cæsar and then Augustus are witnesses of this truth. The kings of Sparta and the consuls of Rome prove also the factious consequences of dividing the executive magistracy." Hamilton, in defending his plan, declared that one executive should be appointed who dared to exercise his powers. The executive council, or the plurality of executives, had strong support. It would conceivably have had three members, one each from the sections of New England, the Middle States, and the South. Such a division, it was feared, would allow two sections to combine against a third. Furthermore, the usual charges of inefficiency and indecision were made. Mr. Rutledge of South Carolina declared that one man would feel the greatest responsibility and administer the public affairs best; but he would not vest in him the power of war and peace. Mr. Randolph of Virginia strongly opposed unity in the executive; he regarded it as monarchical and declared that the country should not be governed by British forms. While admiring the British form of government in itself, he declared that the fixed genius of the people in America required a different form. The great requisites of an executive, namely, vigor, dispatch, and responsibility, to his mind might be found in three men as well as in one. The executive branch should be independent, and in order to support this independence it should consist of more than one man. Mr. Gerry suggested that a council be annexed to the executive in order to give weight and to inspire confidence. Mr. Sherman, taking the view that the executive was merely an institution charged with carrying out the will of the legislature, was of the opinion that the number of executives should not be fixed, but that the legislature should be left with discretion to appoint one or more, as experience might dictate. The plan of an executive council was abandoned, and a single executive was provided for.

The method of election was of considerable interest to the framers of the Constitution. The following methods were proposed: (1) election by the legislature; (2) election by popular vote; (3) election by electors chosen by the state legislatures; (4) election by electors chosen by popular vote; (5) nomination by popular vote, and elec-

tion by the legislature; (6) election by electors chosen by the state executive; (7) election by a committee of fifteen of the legislature chosen by lot; and (8) election by electors at the national capital, choosing the President directly. Hamilton's scheme was the most indirect of all. He would have the people in all the communities vote for a larger number of electors. Several thousand of these would meet to elect a smaller number of electors, and the smaller group, in turn, would meet to elect the President of the United States. James Wilson, the greatest lawyer of the Federal Convention, hesitated to express his preference for a particular form of election. In theory, however, he was for election by the people. He pointed out that experience in New York and Massachusetts had shown that election of the first magistrate by the people at large was both a convenient and a successful mode, and that the objects of choice in such cases were necessarily persons whose merits commanded general notoriety. Roger Sherman of Connecticut favored appointment by the legislature, and advocated making the executive absolutely dependent on that body. An executive independent of the legislature was in his opinion the very essence of tyranny. Hamilton's idea was to make the process of electing the executive so indirect that neither the legislature nor the people could effectually control him. The electoral scheme and election by the Congress were the two leading plans. It was at first decided to adopt the congressional scheme of election; but the Convention later reconsidered its action, and a motion was made for the appointment of a committee on the method of electing a President. The committee reported on September 4, 1787, when the electoral system was adopted, with nine states favoring and two states opposing the plan. The system was really a compromise between the large and small states. Legislative and popular election of the President was feared, and the electoral plan seemed to be a rational compromise.

The term of office gave some concern to the framers of the Constitution. We have already seen from the *Federalist* that duration was regarded as one of the essentials of executive energy. The executive, it was declared, should have sufficient time in office, and a security of tenure which would permit results to flow from his administration and allow his policies to mature. Therefore, a definite tenure of office was asked. Alexander Hamilton proposed tenure for life or during good behavior; he observed that "an executive is less dangerous to the liberties of the people when in office during life than for seven years." He was therefore opposed, not only to the principle of election, but to the principle of limitation in term of office and of office

rotation. James Wilson moved that the term of office be fixed at three years, and observed that he preferred this short period on the supposition that re-eligibility would be provided for. Mr. Pinckney moved for a seven-year term. Mr. Sherman favored a term of three years, and was opposed to the doctrine of rotation on the ground that it would throw out of office the men best qualified to execute its duties. George Mason of Virginia urged a seven-year term and a prohibition against reëlection. This, he said, would prevent an acquiescence on the side of the legislature with policies of unfit character, and the temptation on the side of the executive to bargain and intrigue with the legislature for reappointment. Mr. Bedford of Delaware strongly opposed a seven-year term. He asked the Committee of the Whole to consider what the condition of the country would be if an executive vested with power for that period should on trial be found unfit for service or should lose his qualifications after the appointment. Impeachment, he declared, would not deal with such a situation, because it would concern misfeasance and not incapacity. He therefore stood for triennial elections and for ineligibility to office after a period of nine years. It was voted by five states, with four opposing votes, that a seven-year term be adopted. At a later time this was reconsidered and a four-year term was voted. Nothing was said in the Constitution about reëlection.

The framers of the Constitution wrestled with the problem of qualifications for the President. What should be required of him by the fundamental law of the land? It was decided that he must be a natural-born citizen of the United States. While aliens were admitted to American citizenship through naturalization at the time when the Constitution was adopted, the doctrine of expatriation had not been recognized, either by the United States or by foreign governments, as a natural and inherent right of a citizen. So short an interval between the experience of the Revolution and the adoption of the Constitution dictated the choice of a first magistrate whose identification with his country would be sealed by reason of his birth. Birth within the allegiance or within the territory of the state was the common-law test of citizenship. At that time birth imposed on each citizen an inviolable allegiance, of which he could not be divested without the consent of his government. Few governments gave this consent. It is probable that this was regarded as the ordinary test of American citizenship, and that in prescribing birth within the Union the Fathers were really prescribing American citizenship. By a law of 1868 it was declared that native and naturalized citizens of the United

States enjoyed the same rights within the country and the same protection abroad, except for the constitutional provision now under discussion. The provision has generally operated to the advantage of the United States, although it may have had the effect of excluding prominent and able men from the presidency. Secretary of the Interior Lane expressed the opinion, that the constitutional provision prevented an otherwise inevitable nomination of himself by the Democratic Party of 1912, and therefore made impossible his election. A certain maturity is secured through the requirement that the candidate be at least thirty-five years of age. As recipients of the highest honor within the gift of the people, candidates should naturally be expected to qualify from the standpoint of ability, experience, and maturity. The more responsible positions in business, industry, the professions, education, religion, and statecraft go to the men who have in a sense "been through the mill." The people of the United States did not intend in 1787, nor do they propose to this day, to choose their President from a Sophomore class in a college or university. Most of the occupants of the high office of President have achieved this distinction rather late in life, after a rich experience in statesmanship, and at a time when the rewards of long effort are supposed to flow in. Some younger men have been candidates for office, and some have been elected President. William Jennings Bryan was thirty-six years old when nominated by the Democratic Party in 1896. His political experience at the time was limited to a brief congressional career and to a rather active party service. Theodore Roosevelt was elected at the age of forty-two, and was the youngest man to have occupied that high post. The result is that generally men holding the office are more than half-way through life and without the physical vigor of youth. It is probably true, however, that originality, courage, and leadership are not limited to men of tender years, and that progressive ideas are not so much a matter of youth as a state of mind. President Wilson, having reached the presidency comparatively late in life, was rich in progressive ideas, and applied them consistently to his administration of the government. A third qualification is that the President must have resided within the United States for a period of fourteen years. This requirement insures an acquaintance, for this period at least, with the problems of the President's country, by reason of his residence within it. It is not settled whether this signifies fourteen years of uninterrupted residence, or scattered periods totaling fourteen years. When Secretary Hoover was a candidate for the republican nomination in the California primaries

against Senator Hiram Johnson, the charge was repeatedly made that Secretary Hoover had not lived within the United States long enough prior to his candidacy to come within the constitutional period. The Johnson forces used this argument with telling effect, alleging that Mr. Hoover's residence abroad, even though in the performance of his professional duties as a mining engineer or in war relief work, subjected him to a foreign influence which temperamentally unfitted him for the presidency. The supporters of Mr. Hoover contended as vigorously that he had lived within the United States for the constitutional period, that his residence abroad was for professional and patriotic services which were in themselves their greatest justification, and that his vision and experience, growing in part out of this foreign residence, gave him qualifications which would be lacking in a candidate whose experience was limited to the party politics of a single state. The Twelfth Amendment provides that "no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States."

The Nomination and Election of the President.—The intention of the framers of the Constitution to remove the office of President from popular influence and control was given effect through their decision that he should be chosen by a small body of electors according to methods to be determined by the legislatures of the several states. The design of the Fathers was upset by the rise and growth of political parties. Candidates for the presidency are chosen in this country by political parties. That is where the aspirant must begin. As a matter of fact, the more important decisions are made by the parties themselves in their national conventions rather than by the people of the United States. The party candidate, then, is the man who has the opportunity to make the presidential grade. The selection of the electors is always preceded by the selection of a candidate for President by the political parties. This is done by holding a national convention. Delegates and alternates are chosen either through presidential primaries held in various states or by the party organizations. The national committee holds its meetings prior to the national convention and arranges for the details of organization. The Democrats choose two delegates for each senator-at-large and two for each representative by districts. The Republicans choose four delegates-at-large from each state and one from each congressional district, together with an additional delegate if the district polls 7500 or more Republican votes. The purpose of this provision was to cut down the large Re-

publican representation from the South, which yielded no electoral votes for the presidency but was subject to machine control. The national convention has three functions: in the first place, its business is to formulate party principles into a platform; in the second place, it must nominate candidates for the office of President and Vice-President; and finally, it must organize a new national committee. The work of the national convention begins with the call to order by the chairman of the national committee. This is followed immediately by the nomination and election of temporary officers. The temporary organization of a national convention is purely an expedient one. The temporary chairman delivers the so-called "key-note" speech. He is chosen, not because of his ability as a presiding officer, but because of his ability as a speaker. This furnishes an opportunity for the party, through some of its more vocal representatives, to set forth to the country its claims to a continuation in power or to a resumption of power. The key-note speech is always one of laudation of the party's principles and achievements, and of condemnation of the policies and performances of the other party. It is purely a campaign speech and has the effect of giving a certain unity at the outset to proceedings which eventually must be characterized by varying degrees of diversity.

The committees are next selected. The Committee on Credentials passes upon the claims of delegates to seats in the convention, and settles disputes between rival claimants. At the Republican Convention in 1912 the report of the Committee on Credentials was an important one, owing to the fact that certain Taft delegates were seated over the protest of contesting Roosevelt delegates. Roosevelt charged theft of his support on the part of the regular Republican organization, and consequently withdrew his Progressive forces from the Republican Party. The function of the Committee on Permanent Organization is indicated by its title. The Committee on Rules and Order of Business is an important one. At a moment's notice it must be ready for reference by the chairman of questions having to do with the procedure of the convention. This becomes important, as it gives to the chairman practically complete control of the business of the convention. At times the resourcefulness of the chairman and of the committee is taxed to the utmost, in view of the fact that rival delegations are constantly seeking the floor. The Committee on Platform or Resolutions is charged with the responsibility of drafting a platform upon which the candidate of the party will stand when he goes before the country.

It hears various groups interested in the inclusion of measures and proposals in the platform. Its report to the floor of the convention is sometimes as significant as the nomination of a candidate.

After the adoption of the party platform there follows the nomination of candidates. The chairman of the convention directs the secretary or clerk to call the roll of states. This is done. Alabama is usually called first. She may either nominate her own candidate, as she did in 1924 when Senator Underwood was placed in nomination at the Democratic Convention in New York City, or she may yield to another delegation, which may place in nomination the candidate who has the support of the Alabama delegation. This often gives to a candidate a priority of nomination before the name of his own state is reached through ordinary alphabetical roll call. The delegation sponsoring a candidate sends to the platform its best speaker, who makes the nomination speech. This is followed by a seconding speech, which is limited to two or three minutes. If the candidate so nominated is a major one, his delegation and those adhering to his candidacy attempt to stage a celebration, which they do by taking to the platform the state banners of the delegations in sympathy with his ambitions. About the platform assemble all the party hosts supporting the nomination, and an effort is made to continue the applause and demonstration for a number of minutes. This makes good propaganda for the successful candidate and is doubtless pleasing to the memory of the defeated ones. Not all candidates are major ones. A number of speeches are made in support of "favorite sons" whose party service and prominence do not place them within the ranks of the major contenders. If their names are placed in nomination and even a brief demonstration is staged for them, they can retire to their local political habitat with the satisfaction of having been "prominently mentioned" for the presidency.

After the candidate has been nominated, a Committee of Notification is appointed whose business it is to make a pilgrimage to the home of the successful man and there formally to apprise him of his nomination. The chairman of the Committee on Notification makes a brief speech, which is followed by the formal acceptance of the candidate. This practice is merely to give the candidate an opportunity to lay before his party and the country his interpretation of the platform upon which he stands for election, in addition to further planks which he and his advisers may deem it wise to incorporate. The Speech of Acceptance is a more important document than the platform itself. President Wilson once remarked that a party platform

was like "molasses, to catch flies"; and indeed this is often the case. Measures are included with a view to attracting as many votes as possible. The interpretation of the platform and its individual planks by the candidate himself discloses not only the trend of his thought at the time, but the course which his administration is likely to take.

In the choice of a candidate the Democrats follow the celebrated "unit rule," whereby the candidate receives the total vote of a state delegation when a majority of the votes of that delegation have been cast for him. To make the rule apply, the state Democratic organization must bind its delegates to the observance of it. In the Republican conventions each member votes individually, and no one loses his vote because a majority is cast for another candidate. A majority vote nominates in the Republican national conventions, and this has proved to be an expedient measure. Under this rule the Republican Party usually casts a first ballot in order to determine the strength of the opposing candidates. Up to that point it is anybody's game. After the show of strength and after loyalties to local candidates have been discharged, the effective business of combinations is begun, with a view to a nomination. Sometimes a candidate is chosen on the second ballot, and rarely are there more than three ballots. In the Democratic national conventions a two-thirds majority is required for a nomination. This has had the unfortunate effect of unduly prolonging the convention and of tiring the delegates, and the still more unfortunate effect of defeating the previously expressed will of a majority of the delegates. At the Baltimore Convention in 1912 a strong and defiant Wilson minority held out against the delegates of Champ Clark. The Clark forces polled a majority of the votes on a number of ballots, but the Wilson forces were held together by Colonel House of Austin, Texas. The members of the Texas delegation formed the nucleus of the Wilson support, and they determined to cast their forty votes for Wilson on the first and last ballots. The California delegates had been pledged for Clark, and they also held out to the last for their candidate. The Wilson minority was not sufficient to elect, but was sufficient to prevent the nomination of any one else. After the impossibility of Clark's nomination had become manifest, the break of ranks to the most formidable of the opponents, namely, Wilson, began. The loyalty of Colonel House and his Texas delegation was fully rewarded. He was made the unofficial adviser of President Wilson in matters of party affairs, appointments to office, domestic policy, and Latin-American policy, and was intrusted with authority to

mediate between the European belligerents in the interests of peace. He was made a member of the commission appointed to negotiate peace with Germany, and at one time it was suggested that he be given a position in the cabinet without portfolio. Burleson of Texas was made Postmaster-General; Houston, Secretary of Agriculture and later Secretary of the Treasury; Gregory, Attorney-General; and Cone Johnson was given a position in the Department of State. Thus persistence was rewarded. At the Democratic Convention of 1920, held in San Francisco, the leading candidates for the nomination were William Gibbs McAdoo, of New York, and James Cox, of Ohio. Mr. McAdoo was not an avowed candidate, but the Cox contingent was active in its quest of the nomination for its champion. McAdoo led on a number of ballots, and on different polls commanded a majority vote of the convention. The same was true of Cox. In time it became clear that the two-thirds rule which made possible the nomination of Wilson in 1912 would prevent the nomination of McAdoo in 1920. At length Cox was nominated. Mr. McAdoo removed to California, and was a candidate for the nomination at the Democratic Convention in New York in 1924. The leading rival candidate was Governor Smith of New York State. Smith's forces were insufficient to command a two-thirds vote, but sufficient to prevent the nomination of McAdoo. It became clear that the Smith votes would never be cast for the California candidate and, after much fruitless balloting, the convention compromised on John W. Davis of New York, formerly of West Virginia.

The national committee of the party consists of one man and woman from each state and territory, chosen either by party primaries or by state party organizations. The principal officers are a chairman, a secretary, and a treasurer. The national campaign follows the nomination of the candidate and his acceptance. The chairman of the national committee is chosen by the candidate. He directs the campaign and is both the party representative and the personal representative of the candidate. If his party and candidate are led into the promised land, he is usually rewarded with an appointment as Postmaster-General. The parties maintain national headquarters in New York City, and through the issue of campaign textbooks, the activities of their candidates and campaign speakers, and the influence of their newspapers, they seek to win the electorate to their side.

The most interesting part of the campaign is the election itself, which is held on the first Tuesday after the first Monday of November during the presidential year. The details of the electoral vote, set

forth fully elsewhere, will be discussed only briefly here. Each state is authorized to choose electors equal in number to its congressional representation, and a general ticket is submitted throughout the state by each party offering a candidate. The voter, upon going to the polls, votes for one of these tickets, and the ticket receiving a plurality of votes in a state receives also the electoral vote of that state. If no candidate gets a majority of all the electoral votes cast, the House of Representatives chooses a President from the three highest candidates, each state delegation casting one vote. When the election is thrown into the House of Representatives, a quorum is made up of two-thirds of the state delegations, and the successful candidate must receive a majority of all the votes cast. If the House of Representatives does not choose a President when the right of choice has devolved upon it before the fourth of March, then the Vice-President succeeds to the presidency, as in case of the death or other constitutional disability of the President. The person who has received the greatest number of votes as Vice-President then becomes Vice-President if he has received a majority of the electoral votes cast. If not, the election devolves upon the Senate from the two highest candidates on the list. A quorum for this purpose consists of two-thirds of the entire number of senators. A majority of the whole number of senators is necessary to a choice. After the national election the electors who have been chosen in each state meet and cast their votes. The electors of each state convene on the second Monday of January, following their appointment, wherever the legislature of the state directs—usually at the state capital. After assembling they vote by ballot for President and Vice-President. They cast, sign, seal, certify, and transmit the lists of votes cast to the President of the United States Senate, together with their certificates of election. They have then discharged their function. This procedure is, of course, a mere formality and simply carries into effect the provisions of the Twelfth Amendment to the Constitution. The electoral vote is counted in the Chamber of the House of Representatives on the second Wednesday in February, after the meeting of the electors in their respective states. This is done in the presence of the Senate and House of Representatives, the President of the Senate presiding. The certificates and documents are opened by the presiding officer in alphabetical order, and tellers read the list of votes. Where candidates have received a majority of the votes of the whole number of electors appointed, they are declared duly elected as President and Vice-President respectively. Then follows the inauguration, which is on the fourth of March of the year

following the election. No official notice is given to the President of his election, but he is expected to appear on that date and to take the oath of office, which is administered by the Chief Justice of the United States. President Washington delivered an Inaugural Address, and this practice has been followed to the present day. It is regarded as a great party celebration, as well as an official occasion. It is interesting to note that on previous occasions the newly elected President has been heard only by a few people seated near him on the occasion of the speech. Upon the inauguration of President Coolidge in 1925, the use of mechanical devices made possible the broadcasting of his address to all parts of the United States, and millions of people hundreds of miles away heard distinctly every word of his discourse.

The Legal Position of the President.—The leading powers of the President are derived directly from the Constitution, which provides also for his election and his tenure of office. His independence is guaranteed by express provisions. His constitutional powers give him the right to make treaties, with the advice and the consent of the Senate; to make appointments to office; to veto acts of Congress; to be Commander-in-chief of the Army and Navy; to pardon offenders; and to execute the laws. These powers are given to the President by the people, and they may be taken from him only by constitutional amendment. From time to time the laws of Congress have vested the President with large powers; and often a bill is passed, couched in general terms, which gives to the President authority to issue ordinances or executive orders for the purpose of carrying them into effect. Large authority was conferred by Congress upon President Wilson in 1917, in order that the war against Germany might be prosecuted with the utmost vigor. In some cases the President has enjoyed an enlargement of power due to the interpretations of the Supreme Court. While his powers are expressly set forth, incidental or implied powers may be necessary for the execution of the larger ones. Only experience and practice can determine what they should be, but the courts have in some cases confirmed them. Again, the practice of the Presidents has in a sense determined the scope of the authority of the presidential office. The influence of custom or usage on the American Constitution has already been discussed. This influence extends to the work of the executive; and it often happens that a President's theory or concept of his position influences the scope and use of this power. Roosevelt insisted upon "the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the constitution or imposed by the Congress

under its constitutional powers.'' He declined to adopt the view that what was imperatively necessary for the nation could not be done by the President unless he could find some specific authorization to do it. ''My belief was,'' he said, ''that it was not only his right but his duty to do anything that the needs of the nation demanded, unless such acts were forbidden under the constitution or by the laws.'' He pointed out that under this interpretation of executive power he did, and caused to be done, many things not previously done by the President and the heads of departments. He declared that he did not usurp power but that he did greatly broaden the use of executive power. Such a view of the presidency, however, can hardly be sustained by the best thought and practice on the subject. While much discretion is left with the chief executive in the use of his powers, yet it is not within his right to assume powers which he knows to be non-existent. President Taft was essentially a constitutional executive. He believed in constitutional limitations and held that the Constitution of the United States was a rule for the government—not only for the legislature and the courts, but for the executive as well. Consequently he did not assume authority which was not expressly granted. Theodore Roosevelt divided Presidents into two classes: one of the Lincoln type, and the other of the Buchanan type. He classified himself as belonging to the Lincoln group and Taft as belonging to the Buchanan group. Mr. Taft, in his interesting lectures on ''The Presidency,'' delivered at Columbia University in 1915 and 1916, remarked that there were differences between Mr. Roosevelt and Mr. Lincoln which would give the impartial student of history another impression. Moreover, he declared by implication that Mr. Roosevelt had himself noticed the difference. He pointed out that Mr. Roosevelt, in ascribing ''an undefined residuum of power to the President,'' had advocated and practiced ''an unsafe doctrine and that it might lead under emergencies to results of an arbitrary character doing irremediable injustice to private right.'' The view that the President, acting for the people, could do anything that in his judgment would help the people, unless expressly forbidden, was rejected as a sphere of presidential action virtually illimitable. Mr. Wilson, while he perhaps observed constitutional forms more consistently than Mr. Roosevelt, succeeded to the Jacksonian and Roosevelt ian concepts of the presidential functions. He assumed the leadership of his party, and began the full exercise of his prerogatives within their limits as authorized by the Constitution, the laws, judicial decisions, and usages, as well as by his own concept of the presidential

office. No President has had a wider view of the scope of his powers, and none has used his powers with such telling effect. Mr. Charles E. Hughes, during his campaign for the presidency in 1916, issued a statement setting forth his views of the presidency. He took a decided stand against Mr. Wilson's party and personal leadership, and viewed the office of chief executive essentially from the standpoint of administration. Such a view would be ideal if the political and personal factors having to do with the presidency could be eliminated; but this cannot be done. Of all the sources of presidential authority, that of the concept of the presidential function entertained by the occupant of the office is perhaps the most influential today.

The Execution of the Laws.—One of the powers conferred by the Constitution on the President is that of executing the laws. It provides that "he shall take care that the laws be faithfully executed." In addition, on the fourth of March after his election, the following oath is administered by the Chief Justice of the United States: "I do solemnly swear or affirm that I will faithfully execute the office of President of the United States and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States." Thus the wide power of law enforcement is conferred upon the President. It is one thing to pass laws; it is quite another thing to execute them. The enforcement of a law carries with it the necessity of its construction. The executive must therefore determine what a law means before he can carry it into effect. While the final construction of statutes, especially as they affect private rights, rests with the courts, yet the initial interpretation rests with the executive. In most cases the construction of the executive is not reviewed by the courts. Often Congress finds it necessary to vest in the President or his agents a certain quasi-legislative or quasi-judicial authority. Where laws are of wide application, it becomes necessary to specify the persons charged with their execution and to authorize the making of rules and regulations somewhat legislative in character, but supplementary to the general law. Thus an ordinance power for the more effective execution of a statute is vested in the President or his agents. In the Panama Canal Bill it was provided that the President should, after conference, determine what should be a just and reasonable toll, and then establish it through an executive order. Under the income tax laws the Commissioner of Internal Revenue, with the authorization of the Secretary of the Treasury, may issue rules for the collection of the internal revenue taxes. The Secretary of the Treasury may supplement the general customs laws by departmental

regulations. The Secretary of State is authorized to issue rules and regulations in order to remedy the defects of the jurisprudence applied in countries where the United States maintains extra-territorial jurisdiction. The President, under our tariff and revenue laws, is authorized to enter into treaties of reciprocity with countries which are willing to admit to their shores certain articles from the United States duty-free, in return for like treatment on the part of the United States. The immigration officials must make decisions as to what aliens are entitled to enter the United States under our immigration laws. Such officials may, after a year, even determine whether a person seeking admission as a citizen is really a citizen of this country. Congress cannot confer upon the President the authority to deal with cases which should be heard in the courts. Cases of private right between individuals, and the trial of persons for crime, are legal and not administrative matters. Where the rights of life, liberty, and property are affected, the courts will protect the citizen in his rightful enjoyment of them. Congress cannot deprive a person of these rights except through due process of law, nor can it authorize the executive to do so.

The enforcement of law extends also to the enforcement of international agreements. Treaties, along with the Constitution and laws, are made the supreme law of the land and binding on the judges of the state courts. We have seen that a treaty of the United States has the same legal effect as a law of Congress. The enforcement of treaties is entrusted to the same authorities, and they are entitled to the same respect. Rights secured to aliens by treaty arrangements are as valid as if guaranteed by an act of Congress. Sometimes a law is necessary to enable the executive more effectively to enforce the treaty. Congress may refuse to pass such a law, but the duty of the President to act is clear. The intervention clause of the treaty between Cuba and the United States provides that the United States may intervene for the preservation of Cuban independence and for the maintenance of a government adequate for the protection of life, property, and individual liberty. In 1906 a revolution broke out in Cuba, against the government of President Palma, and Mr. Taft was sent there to attempt to quell the insurgents. Mr. Taft was of the opinion that intervention was necessary under the treaty. Might the President, without the consent of Congress, make use of the army and navy in order to intervene under the treaty between the United States and Cuba? Mr. Taft advised the President that the treaty extended American jurisdiction to the maintenance of law and order in Cuba for the pur-

poses named in the treaty. Under the President's duty to take care that the laws were faithfully executed, it was also his function to enforce the treaty. The army and navy were used by presidential authority to set up a provisional government and to provide for the reconstitution of the government of Cuba. Congress voted the necessary money to meet the expenditures of the provisional government, but the initial authority came from the President.

The President is, therefore, under the constitutional mandate of faithfully executing the laws of the United States, and under the oath of executing the office and preserving, protecting, and defending the Constitution, charged with the important function of enforcing the laws of the Union. His discretion in this regard is very great, and the enforcement or non-enforcement of laws may be due in whole or in part to his attitude. No other power of his is so sweeping, and no other function so important.

The President and the National Administration.—In order that the functions of government may be performed, a vast federal machinery has grown up under the general control of the President; but of this enormous permanent organization, he can be only the directing head. The power to enforce the laws of the Union vest in him executive discretion as to the degree and extent of enforcement. His position as the head of the national administration does not flow necessarily from the clauses of the Constitution; it is due in large measure to the great and steady increase in executive business. As the country has expanded, and as its functions and machinery have become more and more complicated, the processes of government have multiplied. Within a single decade the President's purely administrative functions have increased manifoldly. Today some cabinet officials, and even lesser officers of administration, are charged with more business than engaged the attention of the first President of the United States. The tremendous growth of the executive departments of government throughout the world, seemingly at the expense of the legislatures, has caused a certain alarm. It is now realized that legislatures, due to their representative character, the influence of politics upon them, their changing personnel, and their temporary sessions, are not fitted for the business of government. After all, the people want results. The requirements of dispatch, energy, and action in the executive have therefore greatly increased the business of the President and have required a much larger administrative establishment. The President is authorized by the Constitution to require the opinion in writing of the principal officer in each executive department upon any subject

relating to his respective duties. Congress, following the Constitution in its organization of the executive departments, did not vest in the President any particular power of direction. His administrative power, therefore, has been one of growth and one deeply rooted in the Constitution and laws. According to holdings of the Supreme Court, it is the business of the President to secure a faithful discharge of the duties of administrative officers as assigned by law; but he is not authorized to specify the ways in which such duties shall be discharged. The President may, by making use of the power of removal, influence the conduct of an office.

The permanent administrative establishment at Washington is organized under the Civil Service Laws. Questions of tenure, salary, promotion, personnel examinations, admission to the service, and dismissals, are vested ultimately in the Civil Service Commission. Much discretion in these matters must rest with a bureau chief or a department head. Certainly such details cannot and should not engross the President's time. It is this permanent organization in matters of routine which makes possible the continuity of the government, even when there are changes in administration. With the work of the Civil Service Commission the President should not interfere, although it is within his function to improve the service and make it more efficient. Many employees of the government, men and women, have devoted their lives to a type of work which appeals to them, but which offers little financial reward. Their compensation grows out of an intellectual interest in what they are doing, steady employment, and a comparative freedom from the vicissitudes of commercial and business life. In many cases they have demonstrated an extraordinary devotion to duty. Presidents, cabinet members, senators, and representatives come and go, but the civil functionaries steadily and conscientiously perform their routine functions, usually unmindful of what is going on in the political branches of the government. Their work is inconspicuous but necessary. They have traditions and standards which have resulted from experience, and which are all the stronger because in many cases they are self-imposed. Any serious derangement of their scheme of things would upset the national administration. The President's discretion as to appointment and direction should come, and generally does come, from the top; and as the lower levels of the administrative services are approached, his directing function disappears.

The President as Commander-in-chief of the Army and Navy.— The President by the Constitution is made Commander-in-chief of

the army and navy, and also of the militia when called into the service of the United States. This is both a peace-time and a war-time function. Congress has full power to provide for the maintenance of the army and navy, and to declare war. The President may, however, send the army and navy wherever he may choose, unless the appropriations for the maintenance of these arms of the government service prohibit it. The President might, by reason of his military powers, follow such a course as would lead to war; that is, the consequences of his action might leave no course open to Congress other than a declaration of war, which, from an international standpoint, would be regarded as a ratification of the President's act. It is commonly claimed that the Mexican War was brought about by President Polk, and that Congress was compelled to declare war regardless of its own opinion in the matter. An interesting situation would result if Congress, exercising its constitutional right either to issue or to withhold a declaration of war, were to repudiate the act of a President whose design was war. Possibly some future Congress may attempt to wrest from the chief executive the assumed power of inevitably leading the country into conflict. On April 2, 1917, President Wilson appeared before Congress and definitely announced our entry into the greatest war of history. He assumed congressional ratification in advance. Some leaders in Congress are of the opinion, since congressional authority is necessary to carry on a war, that the steps leading to it, and the justice and necessity of it, should be determined initially rather than finally by Congress. These questions, decided in their early stages by the President, become in the course of the negotiations a matter of national pride and honor. Some leaders of Congress would exercise to the full their constitutional right, including all steps leading to a declaration of war.

While the Constitution requires a declaration by Congress for the waging of war, international law imposes no such requirement. The Supreme Court has determined in the celebrated Prize Cases that war may exist as a fact, either by invasion of the country by an enemy or by an insurrection such as the Rebellion, without a formal declaration by Congress. Where the offensive or defensive forces of the United States are actively used against a foreign country, the affirmation of Congress is altogether necessary to legalize the use of the army and navy. In view of these facts the President may, without congressional consent, take cognizance of a legal state of war growing out of actual invasions or insurrections within the state. Again, the Constitution guarantees to each state a republican form

of government and security against invasion, and, on application of the legislature of the state, or of the state executive when the legislature cannot be convened, against domestic violence. An invasion of a state is an invasion of the Union; it is an act of war, and a legal state of war with which the President must deal. War may result, therefore, both under the Constitution and under international law, without the interposition of Congress. Use of the army and navy of the United States in dealing with situations affecting the people of this hemisphere has been frequently made. Our leading defensive policy, the Monroe Doctrine, requires the adoption of certain defensive measures. It is one of the rights of the American citizen to enjoy the protection of his government against foreign aggression and against an invasion of his personal and property rights. Where other countries cannot, through the enforcement of their own laws, guarantee this protection, our policy has been to provide it ourselves. This has often necessitated the landing of soldiers, especially marines, from American vessels in countries bordering on the Caribbean Sea. Congress has not given the President this authority. It grows out of the right of the government under international law to provide this protection, and out of the President's general power as Commander-in-chief of the Army and Navy to use these forces for protective purposes. It is regarded merely as a kind of international police measure, and not as an act of war. Examples of the use of military forces for this purpose are numerous. President Taft found it necessary to send marines to Nicaragua to protect the rights and property of American citizens as guaranteed under our treaty with Nicaragua. The President of that country, recognized by the Taft administration, requested this action by the United States. President Wilson sent American forces to Vera Cruz in order to exact from the Mexican government of Huerta an apology for certain indignities committed against the American flag. Hostilities were carried on for a brief period, and American occupation of the port continued for several months. President Wilson also sent an expedition into Mexico, under General Pershing, to punish Mexican bandits for their invasion of American territory and their raid on Columbus, New Mexico. The protection of the American border against bandits was not within the power of the Carranza government, even though the latter was recognized by the United States. This use of the military forces of the United States has been conventionalized by treaties with some of the Caribbean countries. Under some circumstances we have engaged in *de facto* occupations of Caribbean territory without

treaty sanctions, usually through the consent of the occupied state.

The President may, as Commander-in-chief of the Army and Navy, use his military power to provide for the faithful execution of the laws. If the law emanates from Congress or from any properly constituted federal authority, it applies equally to all parts of the United States, without regard to state lines. If, therefore, any formidable obstacle to the enforcement of a federal law arises within the confines of a single state, it is within the right of the President to use the military forces for the purpose of removing it. The Constitution, the laws of Congress, and treaties have a universal application without regard to the jurisdiction of states. President Cleveland directed General Miles to suppress the disorder which obstructed the carrying of mails and the pursuance of interstate commerce in Chicago. Eugene Debbs, Socialist candidate for President in a number of campaigns, was at the head of this violent movement of obstruction. The Governor of Illinois protested that only the state legislature or he himself was authorized to request the use of federal troops by the President, and that in the absence of such a request their employment was illegal. The action of President Cleveland, in keeping with the stand of the Supreme Court, established definitely that all American territory was co-extensive with its jurisdiction, and that the President might execute all laws anywhere within American jurisdiction with all the power at his disposal.

The power of the United States as military occupant is vested in the chief executive by reason of his position as Commander-in-chief. During the Spanish-American War we had possession of the Philippine Islands, Porto Rico, and Cuba. Our military occupation of these places vested in the United States all the rights under international law, together with all the responsibilities, of a military occupant. The occupation persisted after the war was over and the treaty of peace was signed. While these territories were declared to be either independent under American tutelage, or a part of the territory of the United States, Congress was for several years silent regarding the matter of their government. The President as Commander-in-chief, through his army and navy officials, carried on the temporary government during the war. After its termination the President set up under his military powers a temporary civil government for the peoples and territories affected. The use of so much presidential authority and power during this period was perfectly legal, and has since been ratified by holdings of the Supreme Court. At length Congress did

speak in regard to the permanent status of these regions. Cuba remained under presidential rule from 1898 to 1903, when it became a republic through the adoption of a constitution and the conclusion of a treaty with the United States. Porto Rico was given a permanent territorial status by the Foraker Act of April, 1900. Military occupation and presidential prerogative prevailed in the Philippine Islands from August, 1898, to March, 1902, when Congress directed the establishment of a civil government there by the President.

The Veto Power of the President.—The Constitution gives to the President a qualified veto power. The constitutional provisions are brief and pointed. After a bill has passed both houses of Congress, it is presented to the President. If he approves, he affixes his signature; if he does not approve, the bill is returned, together with a statement of his objection, to that house of Congress in which it originated. This house then proceeds to reconsider the measure; if it is approved by two-thirds, it is then sent, together with the oppositions, to the other house, by which it is likewise reconsidered. If it is approved by two-thirds of that house, it becomes a law. If any bill is not returned by the President within ten days (Sundays excepted) after its presentation to him, it becomes a law automatically, unless Congress by adjourning prevents its return.

The development of the veto power harks back to early English history. At first all authority—legislative, executive, and judicial—was vested in the king. With the rise of parliament, affirmative legislature authority was assumed by that body, and shared theoretically with the king, as indicated by the phrase "King in Parliament." Thereafter, the legislative function of the king became one of negation only. In the case of the President of the United States, it was made not an absolute but only a qualified negation. It gives to the President an executive check upon the legislative body, and makes possible a certain control of legislation after Congress has taken the initial steps. The assumption by the President of the rôle of party-leader, and his consequent influence upon important legislative measures, gives him a positive share in legislation not granted by the Constitution and not intended by its framers. The veto power is essentially a legislative function; it is placed among the powers of Congress and not in the articles dealing with the authority of the executive. The President must accept or reject a measure as it comes from Congress, and the finality of his opposition depends upon the action of the two houses themselves. He cannot take part in the debates or

in the proceedings which lead to the enactment of a law, but his relation under the veto clause of the Constitution is entirely a legislative one.

The veto function has been exercised in different ways by different executives. There is no implication that a President must disapprove only such bills as have the effect of transcending the provisions of the Constitution. The essence of the power is the need and the wisdom of the measure. Most of the Presidents have regarded bills with a detached view, and have approved or disapproved them according to their understanding of the merits of the case. Some of the Presidents have used the veto power for the purpose of restraining legislation to which they were opposed. In many cases, however, such restraint can be exercised more conveniently and less disastrously through the President's party leadership in Congress. The use of the veto power is more frequent where the President and the Congress represent different political parties, or where there are acute differences between them even though they are of the same party. President Andrew Johnson vetoed a large number of congressional measures in his conflict with the radical Republican majority in both the Senate and the House of Representatives. President Hayes, facing a Democratic House of Representatives during his entire administration, and a Democratic Senate during the last two years of it, vetoed bills affecting the exclusion policy of the United States, its monetary policy, and the enforcement of congressional election laws. Presidents Grant, Harrison, and Taft also faced hostile Congresses. President Wilson, during the last two years of his administration, had to contend with the opposition of a Republican majority in both houses of the Congress—a majority which, in the Senate, was under the personal and partisan leadership of his greatest political enemy, Senator Henry Cabot Lodge. Wilson found it necessary to veto a number of measures which were seemingly directed against the exercise of executive authority. There is no doubt that at this time the power of Congress to enact measures was used to restrain, and in some cases to impair, the President's authority, and that the President, in turn, used his veto power to strike back at Congress. In some of his vetoes he expressly set forth in his statement of objections that the bill, as drafted, contemplated an invasion of the executive authority.

Does the veto power invest the President with the responsibility of disapproving measures which to his mind transcend the powers of Congress under the Constitution? Some people charge the President

with assuming the function of the Supreme Court in regard to all legislation which reaches his desk. Such a charge, however, is entirely unfounded. The Supreme Court speaks only in regard to legislation which comes before it in the form of litigation between parties. William Howard Taft, who enjoys the unique distinction of having passed upon the constitutional soundness of measures both as President and as Chief Justice of the United States, presents an interesting theory. It is his view that, no matter how much a President may approve the expediency of a bill, his duty is to veto it if he holds it to be contrary to the constitutional limitations upon the power of Congress. His oath to preserve, protect, and defend the Constitution of the United States to the best of his ability imposes upon him an inescapable obligation to disapprove any bill which violates the Constitution. This view gives him a broader but less final authority than that of the Supreme Court. The President may, in his discretion, refuse to sign a bill and thus shift to Congress the entire responsibility for its enactment; but this course is taken very infrequently. The better and more courageous practice would seem to be for him either to disapprove the measure altogether, or to approve it and send it back with a statement of his position. If the bill is returned within ten days, it automatically becomes a law without his signature. However, if Congress adjourns in the meantime a return is prevented. There is a vast accumulation of bills during the later stages of each session of Congress. The President may sign or may veto bills after adjournment, according to his pleasure; but he may also merely withhold his signature without the formality of a veto. This has the same effect as a veto, because the bill cannot be returned to Congress for reconsideration. In this way many bills are "pocketed," and the process has given rise to the term "pocket veto." The practice of attaching riders to appropriation bills and other important measures has been followed in some instances. A congressional majority, anticipating executive disapproval of a measure presented for consideration on its own merits, sometimes attempts to coerce the President's signature by attaching indispensable legislation to it. In such cases the President must decide between the harm resulting from the derangement of the government due to the non-passage of essential legislation, and the insidious results which he thinks may follow the approval of measures to which he is opposed. There is no definite practice in this regard. Some Presidents, like Taft, will courageously veto such laws and assume the responsibilities and risks which

inevitably follow, while others will approve the measures and append an explanation that their approval is given in spite of certain objectionable features.

The Power of Appointment.—Under the Constitution of the United States, ambassadors, public ministers, consuls, justices of the Supreme Court, and other officers of the United States whose appointment is not otherwise provided for, are to be appointed by the President with the advice and consent of the Senate. Moreover, Congress may vest the appointment of inferior officers in the President alone, or in the courts of law, or in the heads of departments. The extent to which this power of appointment is customary and not conferred by constitutional design has been discussed under another heading, so that only the constitutional function need be noticed here. The Constitution does not state precisely whether the members of the cabinet shall be or shall not be approved by the Senate. In practice, however, the Senate has shared this right. The power to remove, which is not mentioned in the Constitution, has become an incident of the power to appoint. This phase of the appointing power has been discussed elsewhere. The first group mentioned by the Constitution, whose appointment is vested either by the Constitution or by act of Congress in the President and Senate, includes the important officers of the federal government, such as department heads, chiefs of bureaus, judges of the lower federal courts, members of commissions and boards, and important postmasters. In each case the confirmation of the appointment by the Senate is necessary. The inferior officers whose appointment is vested by Congress in the President, the courts of law, or the heads of departments, include a few important though so-called "inferior" officials, and a vast army of minor officials and clerks who are usually appointed by the heads of departments and bureau chiefs, in keeping with the Civil Service regulations. The President's power of nomination extends freely and almost absolutely to members of his cabinet and, in time of war, to the chief military and naval appointments. The President is usually permitted to nominate members of the Supreme Court without congressional intervention. The nomination by President Wilson of Associate Justice Brandeis was opposed by certain elements in Congress, but eventually it was confirmed. The appointment of Roger B. Taney as Associate Justice of the Supreme Court was refused by the Senate, but he was later confirmed as Chief Justice. Through senatorial courtesy a certain group of offices is controlled by the senators themselves. This does not grow out of the power of the Senate to advise and consent in

the matter of appointments, but has developed from the custom of allowing the senators to share in party patronage. By the same token the nominations of the President to offices within the district of a representative depends, in the case of minor positions, upon the approval of the representative himself. The control by the Senate and House of Representatives of certain appointments within their respective states and districts has resulted in a tremendous consumption of the President's time. He must not only give the senators and representatives initiative in the matter, but he must also assure himself of the fitness of their candidates. While he is the leader of the party, he is also the head of the state; he must remember his position as the faithful executor of the laws. Some way must be found which will relieve the President of considering the applications of candidates having the support of their party-leaders. He often has to protect his administration and even his political advisers against themselves.

The Foreign Relations Power.—The power of the President in foreign relations is fully set forth in the third part of the volume, and hence needs no discussion here.

The Power of Pardon.—The Constitution vests in the President the power of pardon. He may pardon any one guilty of an offense against the United States before and after either indictment or conviction. He may pardon a class, without mentioning the names of the persons included therein, and may make provisions by which persons affected may become members of that class. This is called an amnesty. He may grant reprieves, which means merely a suspension of the execution of a sentence. The power of pardon under the Constitution is absolute in the President, and may not be restricted by Congress. An interesting case was that of *Ex parte Garland.*[1] President Johnson had issued certain amnesty proclamations which restored civil rights to those who had participated in the Rebellion against the United States. Mr. Garland was later Senator from Arkansas and Attorney-General of the United States. A statute had been passed by Congress requiring attorneys practicing in the Supreme Court to take an oath to the effect that they had never borne arms against the United States. All lawyers who had served under the Confederacy were thus excluded from the practice of their profession. The law was held unconstitutional on the ground that it was a bill of attainder, an *ex post facto* law, and also on the ground that it had invaded the President's amnesty proclamation, which had applied to Mr. Garland's case. This illimitable power of the President is an important one, and

[1] 4 Wallace, 333.

his complete discretion gives him full power to deal with the cases as he sees fit. No definite rules or practices have been established. The power of pardon, however, was provided for the benefit of society, and not for use against the public interest. The exercise of clemency is therefore purely an executive function.

The Presidential Message.—It is the business of the President from time to time to inform Congress of the state of the Union. In the early days of the republic the Presidents went before Congress in person and delivered their messages orally; and this practice continued for some time. Thomas Jefferson, while a convincing writer, found no pleasure in public speaking, and therefore adverted to the practice of communicating with Congress by means of written messages. This precedent was followed by all Presidents from Jefferson to Wilson, who revived the practice of personally addressing both houses of Congress in joint session. It has in a sense restored that personal contact between the executive and legislative branches which existed during and immediately after the days of Washington. The power of the messages varies with the control of the President over his party and with his personality. Wilson used the message power to the full, as did also Roosevelt. The latter's messages were like thunderbolts hurled from the presidential throne, directing Congress what to do. As the representative of the people, Roosevelt expected Congress to fall in line and to approve his measures. Wilson often announced his program in the form of a message to Congress and through its wide circulation he gained a party and a popular support which even his party leaders in Congress, though they opposed, could not ignore. During the World War he used his messages as a means of declaring to America and to the world the war aims, as well as the peace aims, of the Allied Powers. In some cases his messages were directed to the Central Powers, and in the opinion of certain European statesmen they had the effect of driving a wedge between the Imperial German Government and the German people. At no time in the history of the world has a domestic communication from an executive to a legislature had so international an aspect, so wide an application, and so significant a result.

The Recommendation of Measures to Congress.—The President is directed by the Constitution to recommend to Congress for its consideration such measures as he judges necessary and expedient. The initiation of legislation is, in theory, left to Congress. It is within the President's right to recommend any necessary and expedient measures which, in his estimation, may be for the good of the country.

The recommendation may take the form of the Annual Message, when a general legislative program is set before Congress and the country, or it may take the form of a Special Message, with particular attention directed to detailed legislative projects. It is also common for the President, playing his rôle as party-leader, to confer with his party chiefs in regard to the early enactment of legislation which is championed either by the party in power, or by the administration, or by the leaders of Congress. Sometimes, through his heads of departments and officers of administration, he drafts bills in their completed form and submits them to Congress for its consideration. He may have in mind the adoption of the measure without alteration, or he may expect modification of it at the hands of the legislature. If the bill is of a technical and non-political nature, it may be sent either to a particular congressional committee or to Congress as a whole. Administrative legislation is usually determined upon in conference between the President and the party-leaders in both houses of Congress, and especially with the leaders of that house in which the bill is first introduced. While Congress is jealous of its authority, presidential pressure often has the effect of forcing through a measure which would otherwise meet defeat. Thus by constitutional direction the President is given a certain initial authority in legislation. While constitutionally limited to a recommendatory process, in practice the influence is actually much greater.

The Convening and Adjourning of Congress.—On extraordinary occasions the President may convene both or either of the houses of Congress in so-called "extraordinary session," and in case the houses disagree as to the time of adjournment he may adjourn them for such time as he may think proper. The authority to convene Congress in extraordinary session is an important one. It may be exercised by reason of emergencies affecting the state of the Union, by serious economic conditions, invasion, rebellion, insurrection, or war. President Taft called the houses of Congress into extraordinary session in 1912 in order to consider the Reciprocity Bill, which had strong administration support. President Wilson convened Congress in extraordinary session in 1913, very shortly after his inauguration, in order to pass the Federal Reserve Act and the other economic measures which formed a part of the Democratic party platform. He also convened Congress in extraordinary session less than a month after his second inauguration in 1917, for the purpose of declaring war on Germany and passing the legislation necessary for the active prosecution of the war. It is to be noted that the President may call either

house in session for the performance of the special functions which are assigned to them respectively. The special functions of the House of Representatives include the right to originate all appropriation bills and tax legislation, and the right to prosecute in cases of impeachment. These functions cannot be completed without the concurrence of the Senate. On the other hand, the Senate performs two special functions in concurrence with the President without the intervention of the House of Representatives; namely, the confirmation of appointments, and the ratification of treaties. An extraordinary session of the Senate for these purposes might conceivably be necessary.

The President may also, as we have seen, adjourn Congress when the two Houses disagree as to the time of adjournment. This is a very limited power of prorogation which is intended to end, through executive intervention, a congressional deadlock over a procedural question. In no sense is it a limited power of dissolution. During the last two years of the Taft administration, when Congress was made up of a Democratic House of Representatives and a Republican Senate, the President called Congress into extraordinary session for the purpose of passing the Reciprocity Bill. The Democratic leaders of the House of Representatives, desiring to pass some tariff measures, feared that the President would adjourn Congress in case of a disagreement on the question between the two houses and thus prevent even the introduction of the measures into the House of Representatives. Taft was approached on the matter, and he disclaimed any intent of making use of this power. The suggestion was made to President Wilson that he adjourn Congress when they were in dispute as to the time of adjournment. It is the clear right of the President to make use of this power at any session of Congress, and it is also in his discretion to judge of the fact of a disagreement. Thus far, however, the authority has never been used.

The Commissioning of Officers of the United States.—The Constitution provides that the President shall commission all officers of the United States. This entails a heavy duty upon him in the affixing of his signature to the commissions of all officers of the government who are entitled to them. During the World War the signature of President Wilson was necessary in the case of an enormously increased number of public officials and army and navy officers. The idea that every captain or lieutenant should have his commission signed by the President is difficult to sustain, in view of the fact that men of outstanding consequence in business, administration, and the professions

were appointed to positions of great importance without the necessity of the President's signature. Relief for the President could be provided by pushing the commissioned officers forward several ranks, and this would still satisfy the provisions of the Constitution. The President has very little leisure even in time of peace. To impose upon him in time of war, or in time of any great national crisis, the purely manual labor of signing commissions of subordinate officials especially, is, to say the least, an ill-advised performance. The commissioning of officers seems at first blush a routine and ministerial function; it is merely carrying out in a formal manner that to which the President and the Senate formerly agreed. A dispute over the discharge of this function led to the famous decision in *Marbury v. Madison*,[2] which established judicially the right of the Supreme Court to review the legislation of Congress as to its constitutionality. Madison became Secretary of State under Jefferson's administration and took over the Department of State from John Marshall. Marbury had been appointed by President Adams to be Justice of the Peace in the District of Columbia for a period of five years, and the Senate had confirmed the appointment and Adams had signed the commission. It was transmitted to Marshall as Secretary of State, who signed the commission and attached the seal. The commission was not delivered to Marbury during the incumbency of Adams and Marshall, and meanwhile Marshall had been appointed Chief Justice of the Supreme Court. Marbury sought the commission from Madison, who refused to deliver it, whereupon Marbury petitioned the Supreme Court for a writ of *mandamus* to require its delivery by Madison. Congress had authorized the issuing of a writ of *mandamus* by the Supreme Court, but such action was not within the jurisdiction of the court as defined in the Constitution. Marshall took the view that Marbury was entitled to receive the writ of *mandamus,* but not from the Supreme Court of the United States. The point as to the legal remedy which a citizen might employ to compel an official to perform a ministerial duty (in this case the delivery of a commission) was lost in the more significant phase of the decision, which vested in the Supreme Court the power to determine the constitutional limits of the other branches of the government.

The President and the Congress.—The principle of the separation of powers divides our governmental functions into three categories. They are in a sense independent. The executive and the legislative are given checks against each other, and the Supreme Court may determine the constitutional limits of the other two branches, as a sort

[2] 1 Cranch, 137.

of referee between the political branches. A certain amount of coöperation is necessary in order to make the government function. Legislative and executive powers overlap in important matters. No bill becomes a law unless it is signed by the President, or unless it is passed over his veto by a two-thirds vote of both houses of Congress, or unless the President does not sign the bill within ten days after its presentation to him while Congress is in session. No nomination for office transmitted by the President to the Senate is effective unless the Senate confirms it. While treaties are negotiated by the President, they must be ratified by the Senate. Legislative and judicial functions merge in one instance: when the President is impeached by the House of Representatives, he is tried by the Senate. The Chief Justice of the Supreme Court presides, because the Vice-President would succeed to the presidency in case of the President's conviction and deposition. The doctrine of the separation of powers would fall to the ground unless the chasm betwen the different departments could be bridged by some means. This has been done in several ways. The most important bond is that of the party. The President and the members of his party in Congress agree upon a certain legislative program, and then use their constitutional powers to carry it out. In this way the checks of one department upon the other are thrown aside, and the coöperative arrangements of the Constitution are called into play. The President and the Senate are drawn together through their sharing of the appointing power. Presidential patronage in this respect makes possible compromise and agreement. Heads of departments are often desirous of securing certain legislation, especially in regard to appropriations for the maintenance of their respective departments and bureaus. The two houses of Congress and often the committees of either house are in need of information which can be secured only from the executive departments or from the President. Congress has a clear right to call upon the executive for information, but the executive may, as he often does, refuse to give it on the ground that its publication is not in keeping with the public interest. Each department, therefore, has something which the other wants, and something which it may give or withhold, as it likes. Usually a rational compromise is effected, and the interests of both are thus served. A few of the congressional committees correspond roughly to some of the executive departments. It is often necessary to secure expert advice in the drafting of bills which concern legislation falling in particular categories. For example, the Committee on Foreign Affairs of the House of Representatives and the Foreign Relations Committee

of the Senate keep in close touch with the Department of State in regard to legislation affecting our foreign service or our foreign affairs. The Rogers Bill, which entirely reorganized the foreign service of the United States, was introduced in the House of Representatives through the Committee on Foreign Affairs. In its preliminary stages the bill was frequently discussed at conferences between the interested members of the House of Representatives and officials of the Department of State. This is only one manifestation of a rather general tendency which may be said to apply to all functional legislative committees. Congress and the President must maintain a close contact in the matter of appropriations. Congress has a certain independence in this regard, because it may call upon the Secretary of the Treasury directly for a report on the condition of that department. Alexander Hamilton was the first Secretary of the Treasury. His celebrated reports on the public credit, excises, the Bank of the United States, and manufactures, were submitted to Congress, usually at the request of the latter; but he insisted upon a direct contact with Congress, should he so desire. Appropriations are required in order that the government may function. The estimates must be drawn up by the heads of departments and chiefs of bureaus, and must be submitted to the Committee on Appropriations of the House of Representatives, where the bill must originate. These estimates must run the gamut of congressional inspection. The executive departments hope for generous treatment at the hands of Congress, in order that their administration may be impressive, and that their personnel may not be curtailed. Congress has at least a theoretical interest in efficiency and economy, but no representative or senator will be unmindful of a party reward which may be lost to himself or to a colleague during a wholesale trimming of the budget. Here again, where both departments have something to give or to withhold at will, they generally get together.

The Presidential System of Government.—One of the leading features of the American Government is its presidential character. As thus styled, this denotes a government with an executive elected by the people for a definite term of years, removable by impeachment, but politically not responsible to the legislature; with a cabinet appointed by the executive, subject to dismissal by him and responsible to him; and with a legislature elected by the people for a term of years and not subject to executive dissolution. The parliamentary system, which is the prevailing European form, includes a titular head of state, hereditary or elected for a term of years, who is neither responsible to nor removable by the legislature; a body of ministers

chosen by the representative legislative body, responsible to it, and subject to dismissal by it; and a unicameral or bicameral legislature chosen by the people for a term of years, and subject to executive dissolution. It is often urged that the parliamentary system brings about a logical and a natural union of powers which is impossible under presidential arrangements, and further that the qualities of responsibility and responsiveness are found under the parliamentary system to a remarkable degree. Against the American arrangement it is charged that irresponsibility, delay, and obstruction are our reward. The possibility of deadlocks between the executive and legislature due to the principle of the separation of powers, has been reduced to a negligible minimum by reason of the growth of political parties. An extra-constitutional development not contemplated by the framers of the Constitution has taken care of the principal charge against the presidential system as it obtains in the United States. Where the executive and the legislative majority represent different political parties, delay and inaction may result; but the necessary legislative measures are always carried into effect. The earliest criticism of our system is found in Woodrow Wilson's *Congressional Government,* published in 1885, in which he describes the American system of government as congressional and the prevailing European type as parliamentary. He represents congressional government in the United States as committee government without particular responsibility; whereas parliamentary government abroad is carried on by executive agents who are the accredited leaders of the legislature and its accountable servants. According to Wilson, then, we have government by congressional committees rather than government by responsible leaders of the legislative majority. In spite of this contrast, however, the presidential feature of the American Government is more striking than its congressional feature, and today the prevailing types are presidential and parliamentary, rather than congressional and parliamentary. The increase in the power of the President, due to his mandate from the people and to the growth of the executive departments, has steadily encroached upon the dignity and standing of the Congress. The Rooseveltian concept of the executive office, which limited its powers only by what was expressly prohibited in the Constitution and laws, was the beginning of this new twentieth-century development. Wilson carried on the Rooseveltian tradition. He revived the custom of delivering his messages to Congress in person, and declared himself to be not only the head of the state, but also the leader of the dominant party. He kept in close contact with his party-

leaders of Congress and used the influence of his high office to push through the legislation he desired. The mere extension of the power and influence of the President and the assumption of his rights as party-leader have made possible in the past, and will continue to make possible in the future, a functioning of the executive and legislative departments comparable in efficiency and results with that of any parliamentary government.

Is it possible, even under our governmental system, to introduce a direct legislative and executive contact which will not violate the letter or spirit of the Constitution, and will result in benefit to both departments? Clearly we cannot introduce into this country the main features of the parliamentary system without a complete rewriting of our Constitution. The cardinal feature of parliamentary government; namely, executive membership in the legislature, is forbidden under our Constitution, which provides that "no person holding any office under the United States shall be a member of either house during his continuance in office." The complete identification of the executive and legislative branches and the absolute union of powers is thus prevented by the Constitution, and such collaboration as may be provided must be in keeping with this provision. Measures designed to bring the executive and the legislature closer together, provided they are within constitutional limitations, might well be taken. In some quarters it is recommended that the President should select his cabinet from men of extended legislative experience. It is also recommended that officials of the cabinet should be vested with a certain responsibility to the President and to one another for presenting a policy before Congress by argument and in the sight of the people rather than by lobbying, and thus assume the consequences of their success or failure. The House of Representatives of the Thirty-eighth Congress referred this proposal to a committee of seven members, which in its report urged the adoption of the reform. It was pointed out that in a number of instances in our history the earlier secretaries of the departments were called into the chambers of either house and consulted for advice and information. In 1881 a committee of the Senate recommended the enactment of a similar bill. This committee adhered to the principle of the separation of the three branches, but pointed out that, although they have a separate existence, they are supposed "to coöperate each with the other as the different members of the human body must cooperate with each other in order to form the figure and perform the duties of a perfect man." Such a plan, it was declared, would require that the strongest men should be elected as the heads of the depart-

ments and also that the strongest men should be leaders in Congress and participate in debate. "It will," said the report, "bring these strong men into contact, perhaps into conflict, to advance the public weal and thus stimulate their abilities, and will thus assuredly result to the good of the country." President Taft urged this change in his Annual Message of December 19, 1912; and he also stressed its importance at various times following his retirement from the presidency. The proposal also has the support of Charles E. Hughes, whose distinguished services to his country are recognized and commended by members of every political party. He has pointed out that the methods of contact between the executive and the legislature may be improved without weakening our safeguards. It should be possible, he has declared, for members of the cabinet to participate in the debates in both houses on matters which concern their departments, and thus be in a position to offer accurate information and to defend themselves against unjust attacks. Much of the debate in Congress concerns matters which "are not and never were." A word of fact from a cabinet officer could restrain much irresponsible and inaccurate discussion. The stability and leadership of the executive are advantages which Mr. Hughes would preserve. He would not do so by overriding the prerogatives of Congress or by gaining unfair advantage for the President. He would, however, establish a recognized contact by the admission of cabinet members to the floor of both houses. It would be merely a procedural change which could be effected under the rules of the houses of Congress. The mechanism for such contact could be easily arranged, he declared, if its importance were recognized.

The President as Party Leader.—The President of the United States is the leader of his political party. He has become so, in the first instance, through the action of the party itself at its national convention—his nomination has settled this fact—and he remains so by reason of the generous suffrages of the American people. He selects the chairman of his national committee, and he names his own cabinet members, who, while heads of administrative departments, must also be political advisers. His party associates in Congress may or may not approve personally of him, or of his measures or policies, yet his remarkable position of leadership and his great personal influence dictate a reasonable acquiescence on the part of Congress in his plans. As the recognized leader of his party, he must, to the extent he deems wise, redeem the pledges of his party platform. To be an effective party-leader, the President must control his party. He can, through the force of his messages, through his direct appeal to the people,

through his personality, and through political coercion, drive a stubborn party into acquiescence, or a halting Congress into agreement. Large powers, both constitutional and extra-constitutional, are in his hands; but they must be wisely used, else even his own party may renounce him.

The President as Head of the Nation.—The President, while a party-leader, is also the governmental head of the United States. He represents the country officially and ceremonially, and under international law he enjoys the usual exemptions to which the head of a state is entitled while outside his own country. He receives the ambassadors of foreign powers accredited to this country, as well as the special representatives and dignitaries of such powers. While he may have been elected by a small majority or even by a minority, as has sometimes happened, he is yet the leader of all the people and the head of the nation. He is commonly called the "chief magistrate." He receives his mandate from the people as a body, and accordingly exerts a wider influence than can possibly be exerted by Congress. He is the spokesman of the country in all matters respecting its foreign relations. He typifies to the people the residiuum of national unity and power. He is the embodiment of the spirit and form of our presidential system of government, which was begun by Washington and has enjoyed a fairly consistent application to the present day. His definite tenure, his undivided counsels, his amplitude of constitutional authority, and his overwhelming political leadership, make him the one continuing, steadying force in the American Government. He has a definite influence in legislation, and practically a free hand in administration. No executive, whether emperor, king, prime minister, or chancellor, titular or actual, hereditary or elective, has so much influence or exercises so much authority. It is indeed a remarkable and even surprising development in one of the greatest of the world's democracies.

II. The State Governor

The Office Considered Historically.—The office of governor is the oldest executive position in the country, and from it much political and administrative practice is derived. The framers of the Federal Constitution had no precedent, except history in the large, for the formation of a national executive department. The state governments had upwards of a century's experience and tradition in developing an executive which came not only to resemble the later executive of

the state, but also to bear the same name. The prerogatives of the British crown were enjoyed by some of the colonial executives. The legislative prerogative of the king included the right to veto legislation, and to dissolve the legislature. The colonial governors could veto bills of the provincial legislatures, and could also dismiss members of the council. The king also appointed all judges, and himself exercised judicial power through the Star Chamber Court. The colonial counterpart of this prerogative was found in the power of the colonial governors to appoint the judicial officers, to constitute the courts, and to preside over the courts of chancery. In the field of administration the prerogative of the king was virtually absolute. The governors, whose authority was guaranteed by chartered corporations, succeeded to it in the colonies.

The office of governor in a royal or provincial colony is fairly represented in the constitutional organization of Virginia. The law of the colony was found in the charters, in the governors' commissions, and in the instructions issued to the governors. There was some statutory law, and much customary law concerning appointment to office and other functions of government. The governor was vested with the usual executive powers. It was his business to establish working relations with the council, to fill vacancies in that body, to make laws in cooperation with it, and to appoint judges as well as military and naval commanders. The council was composed of twelve of the principal gentlemen of the country. It aided the governor in the disposition of lands, in the distribution of the revenues, and in matters of war and peace with the Indians. Most of the acts of the governor were subject to its approval. The governor and five members of the council constituted a court with civil and criminal jurisdiction, and also served as a court of chancery. The governor was in constant conflict with the House of Burgesses. This body did not dispute his right of veto; but it did claim the rights of Englishmen, and used its control of the revenue as a means of exacting concessions from the governor. Salaries, land grants, and the disposition of revenues made for constant friction. The burgesses demanded frequent accountings, and the governor made free use of his veto power.

Under the proprietary government of Pennsylvania, the proprietor was the governing executive when he was present, and his deputy served in a similar capacity when he was absent. The land was given outright, and the governmental power was not vested absolutely in the proprietor. By the terms of the charter he was compelled to secure the consent of the colonists, who were freemen. He was dependent

upon the legislature for grants of money; and that body would, when it so desired, withhold the salary of the governor until the legislation it demanded had been approved.

The executive under a corporate colony is illustrated in the case of Massachusetts. The charter of 1629 provided for a governor and a deputy who were to be chosen by ten people (freemen) of the company. The governor was in reality the head of a corporation, with the voting members as the stockholders. The charter of 1691 defined the powers of the governor. Appointed by the Crown, he was regarded as the personal agent of the king. He therefore represented the British government in the colony, and was the leading colonial executive. He also had the usual executive powers, but they were limited. He could adjourn, prorogue, or dissolve the legislature. He organized the militia, commanded the armed forces, appointed the leading officers, and declared martial law in case of invasion or rebellion. He could not appoint the council or upper house, and his appointments required the consent of this body. Conflicts with the crown through the governor were made possible by this unique division of authority.

The reaction against the exercise of prerogative, and the ceaseless conflicts with the colonial legislatures, led to the weakening of the power of the governor and the enhancement of the powers of the legislature. The first state constitutions reduced the governor's position to that of a mere figurehead, so that he no longer embodied the authority of the crown. The term of office was also reduced, to make him the more dependent upon the people. In Massachusetts as in New York, where he was elected by the people, the governor had more prestige and authority.

The Election of the Governor.—The method of popular election was not largely used by the original thirteen states. The choice of the governor was left in the main to the state legislatures. Today he is elected by the people in all of the states save Mississippi, where the legislature participates in the process. In every case the governors are candidates nominated by political parties. In a few of the states nominations are made under the old system of party conventions, usually composed of delegates chosen from some district, such as a county, township, or legislative district. The more common method is through the "direct primary." This is an election, held under the direction of the state and through its ordinary election machinery, in which the enrolled members of a political party participate with a view to nominating a candidate who shall stand for election on the general election day. A percentage of the signatures of the regis-

tered voters of the party of the aspirant's allegiance is required to a petition, before his name is placed on the primary ballot. The candidate who receives the largest number of votes in the primary election is the one who usually receives the nomination.

Term of Office, Compensation, and Qualifications.—There is considerable uniformity in the term of the governor's office. One-half of the states require a term of two years. Twenty-three states have four-year terms, while New Jersey clings to a three-year term. Like the presidency of the United States, the governorship of a state should have that quality which Hamilton described as "duration," which will give the governor time to develop an acquaintance with the problems of administration, and also allow a reasonable period during which his policies may have an opportunity to mature. A term of less than four years seems insufficient. Massachusetts held annual elections until 1920; and reëlections generally followed unless the governor forfeited his claim to leadership. Most of the states permit reëlections, and they commonly occur. The salaries of the governors are fixed either by the state constitutions or by the state legislatures, and they of course vary from state to state. The lowest is $3000; the highest, $12,000. Usually they range from $5000 to $10,000. The governor is customarily furnished with an executive mansion located not far from the state buildings.

The constitutions stipulate certain qualifications for the occupant of the post of governor. Generally he must be at least thirty years of age; he must be a citizen of the United States; and in most cases he must have resided at least five years in the state of his candidacy. He is not supposed to hold a federal appointment. In three states he cannot, while governor, be elected to the United States Senate. California is one of these states. Hiram Johnson was elected Senator during his second term as governor of that state; but what is a state constitution to a governor who wants to go "higher up," and who can command a sufficient number of votes to overlook the constitutional provision?

How the Office is Vacated and Refilled.—The usual method of removing a governor is through the process of impeachment. The federal process is duplicated in the states for the most part, with the impeachment proceedings beginning in the lower house, and the trial taking place in the upper house. The method has been used very sparingly in the history of the state governments. There have been very few impeachments, and still fewer convictions. Some of the states provide for the removal of the governor through the "recall,"

which is applied to the elective officers of the state. When a designated number of registered voters petition an election for the removal of a governor before the expiration of his term, and rival candidates are placed in nomination, the election must, under the law of these states, be held. If one of the rival candidates receives more votes than the incumbent, the latter vacates the office and the successful candidate serves in his place for the residue of the unexpired term. The office may also be vacated by the death, resignation, or removal from the state of the governor. In these instances, and in the case of impeachment, the lieutenant-governor is, in most states, next in line of gubernatorial succession.

The Powers of the Governor.—The powers of the governor are generally set forth in the state constitutions. As the Constitution of the United States vests the federal executive power in the President, so the fundamental laws of each state vest the state executive power in the governor. What does this mean? Is there some magic in the term, which gives to the governor a primacy in the state not enjoyed by the legislature or by the other state officials? The improved position of the governor in public esteem and in power does not flow from the constitutional grant of general executive authority. The specific grants in each case must be examined to disclose just what the real powers of the governor are. The state constitutions are as a rule construed narrowly as regards the governor's powers. The state supreme courts have produced no outstanding men who have erected for the state governments such great powers as John Marshall, for instance, erected for the federal government.

One of the powers of the governor is that of veto of legislative measures. The details of the process need not detain us here, as they closely resemble the federal plan already described. It is a continuation of one of the prerogatives of the colonial governors. The first state constitutions swept this power away, in their radical swing from executive to legislative control, but in time it found its way back into the state executive arrangements. The measure may be used, as the federal veto is used, to pass on the merits of legislation, and to negative laws which, in the opinion of the governor, are unwise and inexpedient. It is also used as a political weapon, for the governor may, and often does, withhold his signature from bills which the lawmakers desire, unless they agree to the legislative program of the administration. Most of the states require a two-thirds vote in order to override a veto of the governor. Some require three-fifths, and a few require a majority. North Carolina does not give the governor this power, but all of

the other states do. The governor may use the power of veto to set aside laws which he deems unconstitutional, and similarly measures which conflict with his major policies will generally meet the governor's axe. Plainly the judgment of the governor must control in regard to all legislation, unless the measure can muster the necessary majority to overcome his opposition and veto. In practice this serves as a salutary check on the will of the legislature.

The governor of a state, like the President of the United States, is authorized to communicate with the legislature concerning the state of affairs of the commonwealth. He also has the right to recommend to the legislature, for its consideration, such measures as he deems proper. This may be done in the form of his regular and special messages to the two houses of the legislature. A governor possessed of a strong personality and able to exert an effective control of his party may, if need be, appeal over the heads of his legislative majority to the people of the state. In such a case his message is addressed to the legislature in form, but to the people in fact. Members of a state legislature, if they have regard for their political life, will hesitate to incur the displeasure of a strong governor. The message may contain the major legislative program of the administration, in which case it becomes a useful document, and serves the interests of the executive and the legislature alike. This use of the message results when there is good understanding between the two branches.

The governor is given the right to call both houses of the legislature into extraordinary session; but the occasion must generally be "extraordinary." Situations requiring such a measure may be the revision of the laws of the state, an uprising, insurrection, or serious disorder, industrial conflicts, race riots, or whatever in the opinion of the governor may constitute an extraordinary occasion. A number of the states forbid their legislatures, when thus called, to consider any measures other than those proposed by the governor, or those for which the session was expressly convened.

Chief among the governor's powers is "to take care that the laws are faithfully executed." The constitution gives him this right, and he takes an oath to the effect that he will exercise it. He is charged with the general function of enforcing the laws of the state. He is the head of the state administrative system. He may order the state's attorneys to institute proceedings against any person or persons whom he deems guilty of violating the laws of the state. It is his business to maintain peace and order. When the situation requires him to do so, he may proclaim martial law and call out the militia to enforce it. In indus-

trial conflicts he must either act with courage and run the risk of alienating the labor and radical vote, or else he must yield to demands in the hope that the consequences will not be too damaging and that the support of the aggrieved parties will not be lost. Sometimes the control of the governor over local officials makes possible an effective enforcement of the laws, even where there is formidable local opposition. This is especially true in the State of New York. The lack of such control may tie the governor's hands, in which case the only answer is martial law, or an executive disregard of the situation. In Kern County, California, the workers in the oil fields went out on strike. They controlled the county courts, the sheriff's office, the board of supervisors, and practically all of the other county agencies. No legislation contrary to their plans could pass the board of supervisors. No warrants or writs issued from the courts for arrests; and if they had issued, the officers of the law would not have served them. The administration of justice was entirely at a standstill, and the situation was used to give a color of legality to the manœuverings of the strikers. It was essentially a government within a government, for the benefit of a certain class. The personal and property rights of people passing through the country were in the main respected, and a fair degree of protection was provided for them; but no protection whatsoever was given to the interests against which the strike was being conducted. The governor of the state did nothing at all to prevent this régime. The lack of control over local officials, and the fear of losing political support, may operate to restrain a governor from executive intervention, when otherwise he might be moved to act.

The administrative power of the state governors is substantially diminished owing to the lack of centralization in their administration, and the consequent impossibility of exercising direct control. Should this defect be remedied, state administration might be as speedy and as efficient as national administration. The question of centralization and control, and the comparative efficiency of the federal and state systems, were fully set forth by Charles E. Hughes in his Inaugural Address of 1909 as Governor of New York:

> While the governor represents the highest executive power in the state, there is frequently observed a popular misapprehension as to its scope. There is a wide domain of executive or administrative action over which he has no control, or slight control. There are several elected state officers, not accountable to the governor, who exercise within their prescribed spheres most important executive powers. To the comptroller and state treasurer are confided administrative powers with respect to financial matters. The

attorney-general is charged with duties appropriate to the enforcement of public rights through legal machinery. The state engineer and surveyor has important powers with regard to the canal improvement and the only member of the canal board accountable to the governor is the superintendent of public works, who has a limited authority. The commissioners of the land office are independent of the governor. . . .

Our system is therefore widely different from that of the federal government. The President, through his cabinet, has direct control of the great executive departments, and administrative officers, though appointed with the concurrence of the Senate, are responsible to the President and removable by him. Yet it can hardly be said that there is more reason to fear centralization in the state than in the nation. The practice of withdrawing appointive administrative officers from direct responsibility to the executive head of the state, who is directly accountable to the people, is of doubtful wisdom. A division of accountability which practically results in no real accountability to any one lessens the proper stimulus to efficiency.

Responsibility to the people is the essential safeguard of free institutions. This does not mean that the election of all or even of a great number of administrative officers, for undue burdens upon the electoral machinery would defeat its purpose. But it would seem to imply that distribution of administrative powers should have as its correlative the proper centralization of responsibility. It may fairly be said to require that the executive authority, exercising the appointing power under whatever check, should be responsible for administration and should have the control upon which such responsibility must rest.

In addition to the enforcement of laws and the general supervision of the administration of the state, the governor has also the power of appointment and removal. As does the Constitution of the United States, so the state constitutions prescribe that the governor shall appoint certain specified officers, and also other officers whose appointment is not otherwise provided for. He does not appoint or control the elected administrative officials. The newly created officers of administration are for the most part appointed by the governor. The many commissions which have been created for the performance of technical, professional, and expert services are subject to gubernatorial appointment. The appointing power gives to the governor a certain amount of patronage, which commonly goes to the persons who have supported him in his election to the office. It was not large at first, but has grown steadily. Some of the positions have been created with the idea of patronage in mind. It was found that there were not enough jobs to go around. Especially within the last decade there has been a tendency to exercise to an extreme degree the regulatory function of the

state. This has required a large number of boards and commissions. The functions of the state have increased by leaps and bounds, and the social agencies of the state have increased in proportion. All this proved to be an expensive business. A reaction set in, and many governors were elected on platforms of efficiency and economy. Business suffered from an undue amount of regulation, and taxes soared skyward. The social and welfare work of the state was more than the traffic could bear. The tendency at this writing is to lessen rather than to increase the state executive agencies.

The governor must share the appointing power with the Senate or upper house. The use of the power of confirmation varies; sometimes it is used to check the governor in his effort to make unwise personal or political appointments; again, it is used to resist the executive in an honest effort to provide the state with the best appointments available. It may be used by the Senate—as the governor may use his power of veto—to compel the executive to give his assent to measures which find favor with the state senators. The merit system is applied to the subordinate employees of a number of the states, thus taking from the governor a considerable amount of patronage. While not wholly satisfactory, the system has settled, to a limited extent, that in certain cases the rewards for party service shall not come from the public treasury. The power of removal attends the power of appointment; but it is not a wholesale power. The governor can generally remove only for cause, which must be established through the filing of charges and the conduct of hearings. It sometimes happens that the concurrence of the confirming power is required in dismissals. This limitation may work to prevent the executive from directing his fire against appointees without cause, but it may also help to keep inefficient and unfit men in office. The relation of the governor to the power of appointment and removal is described by Mr. Hughes as follows:

> The multiplication of executive duties incident to the vast and necessary increase in state activities has resulted in the creation of a large number of departments exercising administrative powers of first consequence to the people. The governor has the power of appointment, but in most cases the concurrence of the Senate is necessary. The terms of these officers are generally longer than the governor's term. And in their creation the legislature with a few exceptions has reserved final administrative control to the Senate in making the heads of departments, to whose appointment the Senate's consent is necessary, removable only by it. . . .
>
> The governor is to "take care that the laws are faithfully executed." But with respect to this duty there are further limitations than those involved

in his relation to appointive officers. It is part of our system of government that the laws in large measure are enforced through officers locally chosen. To the governor in certain cases is given the right to remove local officers, but this is only upon charges properly made and sustained after hearing. While the governor's exercise of this jurisdiction is not subject to review, he in his province, like the highest court of the state in its province, must not act capriciously or arbitrarily, but in accordance with the rules and principles governing his authority. The governor is as much bound to support our constitutional system of local government so far as it provides for the local choice of officers, as he is to remove officers clearly proved to be guilty of serious neglect or misconduct. The governor has no right to use his power of removal to assert his preferences or to attempt even temporarily to impose his will upon the community which has chosen its officer. The appeal to him is the necessary check to secure responsible government and must be justified by proof of such dereliction as may be sufficient to make removal of the elected officer consistent with our fundamental principles of local self-government.

The governor has a certain military authority, as the commander-in-chief of the state militia. When disorder gets beyond the control of the officers of the law, he may call out the National Guard to quell the disturbance and to restore order. The governor is the judge of when this is necessary, but he seldom intervenes unless the responsible authorities of the city, county, or other political subdivision make the request. Martial law may be instituted, with the result that the local courts are closed and the ordinary authorities are supplanted by the military. The writ of *habeas corpus* may be suspended, but only in cases of rebellion or invasion where the public safety requires it. This is similar to the provision of the Federal Constitution. Federal troops may be ordered into a state where the legislature requests them, or where the governor extends the request if the legislature is not in session.

The governor of the state has the power of issuing pardons, reprieves, and commutations of sentences. Sometimes this power is absolute in the governor, as it is in the President of the United States. In some states the Senate shares it; in others, a Board of Pardons. There is a tendency on the part of some executives to use this power too freely. Wisely used, it may help to repair an injustice, or to restore former rights and a place in society to an injured person. The power of pardon may be abused for political purposes. When used too freely, it removes the stigma attached to the prison sentence, which is intended not alone to punish the offender, but also to deter others from a repetition of the offense.

The governor has always had some control over state finances, but for years the appropriation bills have been drafted by committees of the state legislature. The drafting of budgets has lately been recognized as an executive function. The governor, or some one responsible to him, has been constituted by recent legislation the chief budget-officer. He is in the best position to inquire of the various state departments, offices, and institutions their probable needs, and to present the estimates to the legislature, together with his recommendations. This has simplified budgetary procedure, and in many cases has reduced the state finances to a matter of system and efficiency. Some executives have used this new power over the purse as a means of making war on certain state institutions by cutting off the appropriations. Only the legislature should have this authority. If such a tendency should become current, the people might restore to the legislature its former right to deal absolutely with appropriations, from their initial stages until their delivery into the governor's hands for approval or rejection.

The state in the Union has no international existence, but the governor is the head of the state and its ceremonial representative. When the federal government communicates with the state governments, it does so through the governors. Federal functions are often facilitated through their coöperation, especially in time of war. When President Roosevelt conferred with California in regard to the San Francisco School Board Law, he dealt with the governor of the state. When President Wilson found it necessary to discuss the California anti-alien land laws, he sent Mr. Bryan to California to interview Governor Johnson. The governor also conducts all negotiations on behalf of his state with other states, as in the extradition of criminals, or in negotiations leading to a compact between the states.

The Governor and Leadership.—What type of man is elected governor? With forty-eight states, and with so many different men filling the office in a single generation, broad generalizations are dangerous. Nor can governors be reduced to type within a single region. Their legal position is one which would restrict and even submerge leadership rather than encourage and develop it. No matter how limited the governor's constitutional status, the example of the President of the United States benefits him, because the people look to him for leadership, and desire within their commonwealth a duplication of the leadership to which they are accustomed in the nation. The governor is, after all, the one unifying element in the state government, and the one steadying force. Like the President, he receives a mandate from

the people. The more important political controversies concern his candidacy. To many people he stands out as the one opportunity, the one ray of hope, in the creaky and functionless machinery of state government. The people turn to him with a sense of relief after the inaction and delays of the legislatures, and after the political bungling of the elective administrative offices, which, after all, are service departments in which politics and bargaining should have no place. The opportunity for leadership is thus opened in a remarkable way, and even men of ordinary ability are able to win national renown. But the people are often disappointed; perhaps they have been led to expect too much. Many candidates, appearing to be men of promise in the pre-election campaigns and in the early stages of their administration, completely fall down before their administration has run its course. There is a tendency for the mediocre man to regard the large opportunity before him as a great personal victory, and to look upon his own words, recommendations, and policies as having a certain magic, and as being worthy and sure of adoption because they come from him. Such men do not properly measure the collective ability and acumen of the legislature. State legislative bodies today are not altogether pleased with their loss of prestige. Many of their members are men of ability who could rise to conspicuous heights of statesmanship if placed in the governor's chair. They will not throw away an opportunity to regain their former position if the governor, through his lack of vision or tact, abandons his own high place. The large growth of executive business, coupled with the present-day emphasis on getting results in government, is responsible for the importance of the executive. But the governor's real position is much magnified. When great issues must be decided, and when policies of paramount importance are hanging in the balance, the people inevitably turn to their representative assemblies, which, after all, are the cradles of democratic government.

Some few leaders have merited this new confidence reposed in the governor. Sometimes the candidate is dictated by the party "boss" of the state, as were Platt of New York, Hanna of Ohio, Herrin of California, and House of Texas. But the day of the single boss in state politics is passing. The governor must, to retain his new position of prestige, have opinions and courage of his own. Nothing so decreases his opportunities for continued leadership as the impression that his policies or ideas are dictated by some powerful but invisible (and therefore irresponsible) force. The people now reward irresponsibility by retiring from power the "rubber-stamp" who gives the unseen

element its day in court. Not a few men have risen to great recognition by their defiance of the political "boss." One of the most spectacular governors the country has known was Theodore Roosevelt. He would be the same man anywhere. He himself declard that Senator Platt, an essentially practical man, as all "bosses" must be, picked him for the Republican candidate because he (Platt) knew that no other Republican could be elected. Roosevelt made wise use of his powers and opportunities of leadership. He appealed to the people in order that they might, from their own districts, control their representatives and influence them to favor Rooseveltian policies. He did not defy the legislature as a coördinate branch of the state government. He was chiefly concerned to secure the passage of much-needed legislation, which he accomplished by going directly to the people and directing their sustained attention to his proposals. Charles E. Hughes was a governor of ability, courage, and independence. He was not controlled by a boss régime, nor did he upset the established order. He was in a limited sense a "reform" governor, but his reform measures were chiefly along the lines of sane administrative reorganization. He was at least "constitutional." The outstanding governor of the Hughes type, who travels along on an even keel, must play an actively conservative game. He cannot be radical, else he will be doomed politically; he cannot be "silent" or "dead," else he will be lost in the quagmire of political mediocrity.

Some governors have been swept into power on the waves of political reform. Such men often do introduce the necessary changes, but they seldom serve the purposes of every-day business management of the state over an extended period. La Follette became Governor of Wisconsin in a campaign against the "bosses." In 1905 he was elected to the United States Senate, and as long as he lived he was returned by his state to that body. Governor Folk of Missouri was the prosecuting-attorney type of state executive whose usefulness was short-lived. Hiram Johnson of California made something of a reputation in graft prosecutions, and even went so far as to announce his candidacy for governor on the platform of ousting the Southern Pacific Company from its position of control over the state government. This slogan appealed to the people, with the result that he was overwhelmingly elected after a whirlwind campaign. During his administration he introduced many reforms and established many new commissions. Ex-President Taft, in discussing these Johnson measures, referred to California as a "political laboratory" where an expensive brand of experimentation was being carried on. The eastern states, he

said, were willing to look on and await the results, while California paid the bills. Johnson was later elected to the Senate of the United States, having in the meantime become a more powerful boss than Herrin. A reaction then set in against his commissions and the heavy expenditures for their maintenance, whereupon the conservatives captured the state government on a platform of efficiency and economy. The prosecuting-attorney type of governor seems to serve the state well only for a limited period. The crusader is needed—but not for all time. Such men, elevated to the Senate of the United States, seldom seem to comprehend the larger issues of constitutional and international law, but continue to think in terms of "getting the grafters" and "making war on the bosses." Such service is necessary, but the wheels of the government must keep turning, and the people demand something of their government other than a continued struggle for power among politicians.

Woodrow Wilson as Governor of New Jersey introduced into state politics the same principles of leadership which exalted him as President of the United States. He was nominated by the "bosses," but they could not control him. Boldly assuming the leadership of his party in the legislature, he controlled its members by threatening an appeal to the people unless they followed him. The wise executive will first try, if he can possibly do so, to have his legislature work with him through his party organization; for carrying an issue to the people is dangerous when it is not necessary, and it may be overdone. The Democratic leaders of the New Jersey legislature met to discuss their legislative program, and Wilson, uninvited, appeared at the meeting. His intervention in the majority program was resented by some of the party-leaders, who regarded his presence as inappropriate. Wilson answered these objections in the following words:

> Gentlemen, I have been elected Governor of New Jersey by the people of New Jersey, selected by the convention of the Democratic party, and I thereby have become the responsible leader of the Democratic party in the state. I will be held responsible by the people at the polls. I will be held responsible for the administration of the affairs of the state of New Jersey. Each of you gentlemen will be held responsible in the districts where you are elected. I am held responsible as well as you by the same people. I am the only person in the whole state, however, to express approval or disapproval on behalf of all the people, and I will express that approval or disapproval by determining what we should do.

This was something new in the annals of state party leadership, and the leaders would not accept such a position without debate. Wilson presented his legislative program to them, and in the end they adopted it. Indeed, the legislature passed substantially his entire list of proposals. The assumption by Wilson of the power to dictate the legislative program was galling; but the people were in the background, and the members of the legislature realized that he would appeal to their districts unless they gave their assent. The people generally elect a governor and legislature of the same political faith, in order that they may agree. If it can be prevented, the time of the people and of the government should not be taken up in controversies between the two branches. The contests have been settled, in theory, at the general elections. The people expect their servants to pay attention to business for a time at least, and not to begin another contest as soon as the new agents have assumed power. The Wilson plan of coördinating the legislative and executive branches under executive leadership accomplishes the best results when there is an executive who can lead; but the irresponsible assumption of this function by defiant men may lead to chaos.

III. The Executive of the City

The Mayor.—The leading executive of the city is widely known as the mayor. The office was established in the United States, like so many of our colonial institutions, along the lines of the British model. The mayor was usually a member of the common council of the city, and presided over its sessions. He did not enjoy his present-day powers as an independent executive. He was the titular head of the city, much as the President of the Congress under the Articles of Confederation was the head of the United States. During the colonial régime he was appointed by the governor—except in four cities, where he was elected. The principle of popular election was introduced during and after the Revolution, although in a few cases the governor retained the power of appointment. In due course his popular election required an independent status and a freedom from the restraint of the municipal representative body. This did not give him the executive leadership which was deemed necessary. The appointing power stood in his way. He had to have the authority to appoint the leading officials of the city, and to make his control complete he also had to have the power to remove them. Many of the cities invested him

with the complete prerogative of appointment by not requiring confirmation on the part of the legislative body of the city. By a process of evolution the office of mayor has gained, in numerous cities of consequence, a political and administrative power.

The mayor enjoys a popular mandate from the people of the city, as does the President of the United States and the Governor of the State. His more frequent term of office is two years, but he is sometimes elected for one, three, four, or five-year periods. His salary varies in the many cities. In New York City he receives $25,000 a year. The mayor has the usual powers which are conferred upon him by the charter, and such *de facto* powers as his personality and leadership can command. He is the head of the city, and acts as its representative on ceremonial occasions. The governor of the state, in dealing with any city within his commonwealth, addresses his communications to the mayor. It is also the mayor's business to receive, in the name of the city, any representatives of other states, cities, or foreign countries who may visit it or pass through it. The failure of Mayor Harrison of Chicago to invite the Allied War Missions to that city during their stay in 1917 embarrassed the federal government, and raised the suspicion that the city government was not in sympathy with the war aims of the United States. The mayor is in a sense the director of the city administration. This develops, not so much from his power to see to it that the laws are faithfully executed, as from his power of appointment and the removal. Where there are a number of elected administrative officers, the discretion of the chief executive in law enforcement is correspondingly decreased. His greatest opportunity for good or evil grows out of his control of the police department. The safety, security, and good name of the city are in his hands. Some cities require aldermanic approval for both appointments and removals. In such cases the control of the mayor is not so absolute, but it often works as a salutary check. The mayor, in an increasing degree, is being made the budget-officer of the city. Under the newer arrangements all estimates must generally go through his office, and the discretion of the council is limited to approving, reducing, or striking out his estimates. Thus the city council has lost much of its power, and the bargaining for contracts has passed from the council chamber to the mayor's office. The mayor may be the president of the council, but this is not usually the case. He may recommend measures to the council, and may send messages setting forth the condition of the city's affairs. He has the usual veto power, and in most cities his veto must be overridden by a three-fourths vote in order that a vetoed

measure may become a law. The exercise of this power has become so common that it is now the usual procedure. It is not regarded only as a safeguard, and from the constant use of it many mayors appear to vent their prejudices and their spleen rather than their convictions. Generalizations in regard to the office of mayor are dangerous and difficult because of the multiplicity of cities.

The position of the mayor varies today according to the plan adopted, rather than from state to state and from city to city. In the historical scheme, we have a mayor, elected by the people, with a limited appointing power and some legislative functions. The mayor plan, as it has evolved today, attributes to that official the position of chief executive, with power to appoint and control the administrative officers, and with authority to prepare and submit the city's budget. The commission plan retains a mayor with little power of veto and appointment, charged with presiding over the commission, and acting as the titular head of the city. Under the city-manager plan the office of mayor, if retained, is merely a titular one, involving little power.

The office of mayor, under the charters which have improved its position, is supposed to command the interest of men of administrative ability, who will measure up to the demands of the office, and to its opportunities. But the fact is that men possessed of such abilities are not attracted to the post, because their services are well compensated elsewhere. They will not stake their chances of success or depend for their living on a scramble at the polls. The successful men are often of the vote-getting and bargaining type who have contributed so much to the American city's loss of public esteem. They are adept in padding the public payroll, where increased expenditures can be met by increased taxation: but few of them could conduct a successful business of their own. Often they are merely the agents of invisible government, and are raised to power or put aside as these unseen forces feel that their interests are served or injured. Such men do not realize their folly until they find themselves deserted and new agents set up in their places. Occasionally a strong man is elected mayor, but he seldom holds his own. John Purroy Mitchel was the young and brilliant Mayor of New York, and gave to that great city its most efficient administration. In particular, the police department was organized on a basis of merit, and a professional spirit was instilled into the members of the force. The city was never so secure. Vice, if it existed, hunted for cover and stayed there. The judicial administration was also improved. High-salaried experts were put in charge of the departments, whether from New York City or not.

Contracts were awarded on a business basis. The mayor had ability, energy, and charm, and managed the city as a merchant would manage his business. But Tammany Hall became hungry, and the invisible forces did not want so much general security. The forces gathered, and Mitchel was defeated by John F. Hylan, the Tammany candidate, a man of mediocrity, who for eight years directed the destinies of the city, only to be repudiated by the very elements which had swept him into power. Such a result discourages strong men from standing for election.

In Los Angeles a new charter had been adopted, giving large powers to the mayor of the city. Its previous experience in electing mayors had been most unfortunate. Some of the elections resulted in recalls, resignations, and public scandals; others resulted in the choice of distinctly mediocre men. Mayor Cryer, the incumbent, was a well-meaning man of average ability, but possessed few of the essential qualities of leadership. He was in constant trouble in regard to his appointments, and was frequently at loggerheads with the city council. No suspicion or charge as to irregularities in his personal or official conduct was imputed to him. He was surrounded by political advisers whose counsel he sought and followed. The criticism against him was that he was mayor in name only, taking his orders from another; and while he meant well, he blundered in his administration. His ability for making contacts had not been established during his first term. One George H. Dunlop had been secretary of the Board of Freeholders which had drafted the new charter. With the increased powers of the mayor provided for, Mr. Dunlop, knowing the charter best, desired that a strong and forceful personality, with proved courage and established capacity for leadership, be entrusted with the responsible work of carrying the new government into effect. A group of citizens, headed by Mr. Dunlop, induced a judge of the United States District Court, Benjamin F. Bledsoe, to resign his federal post and to enter the election lists against Mr. Cryer. Judge Bledsoe seemed to possess all the requisite qualities. He was an interesting speaker, a man of commanding personality, and occupied a position of undisputed leadership in the community. Curiously enough, a majority of the voters of Los Angeles did not want this type of leadership at the time when it seemed most needed. The Judge had demonstrated his courage in handing down certain judicial decisions, and during the campaign these were used against him by certain labor interests. His reply was that he had taken an oath to support the Constitution of the United States, and that in his judicial administration he would do so, cost

what it might. Too much independence of mind and firmness of leadership, both in the office and in the man, would mean a new order. Many people, while they desired a change, preferred what they had to a new régime, one under which power would be wrested from the old order and exercised by the mayor as the representative of all the people. Judge Bledsoe was defeated for the office. While his courage and public spirit in giving up a life position are to be commended, his defeat will discourage men possessed of like qualifications from leaving their businesses and professions to measure swords with "politicians."

The City-manager.—Other than the mayor, the city-manager is in an increasing number of cities the leading official whose duties are essentially executive. The commission type of city government is an admixture of executive and legislative functions, and is discussed elsewhere. The city-manager is divested of his political functions, and is a trained administrator, who heads up the city's administrative system. He is selected because of his special ability and training as an expert in municipal administration. As the directing head of the administration, he appoints the leading administrative officers, and prepares the budget of the city. He is responsible to the city council, which has the authority to appoint him, to dismiss him at any time, to vote or withhold the city revenues, to make laws without the restraints of the veto, to require examinations and explanations of his books and official papers, and to require his justification and defense of his course at the official meetings of the council. The city-manager is presumed to have an indefinite tenure, and to be dismissed only for cause. He is an expert, and is supposed to carry out the orders of the city council in the most efficient manner possible. The plan is based on the theory that the political phases of the city's life are less important than its administrative and service phases, and that politics has a larger place in state and national affairs than it has in municipal concerns. The plan which will result in a more beautiful, healthy, and prosperous city, and in the most efficient and economical administration, is regarded as the best. Good municipal services are supposed to outrank political leadership. The city-manager bears the same relation to the city council as the president of a university bears to the board of regents, the superintendent of schools to the board of education, or the president of a bank to the directorate.

The city-manager plan is on trial today. It seems to be the most popular of the new proposals. Only experience can prove whether it will do for municipal government what so many people hope. Los

Angeles rejected it, on the theory that it was not adapted to so large a city. On the other hand, Cleveland adopted it on the ground that it would solve the municipal problems of a large metropolitan community. Granted that politics are the least important phase of municipal life, and that effective administration is the most important, the plan reduces to a minimum the opportunity for political activity and influence, and, in turn, for political reward as well. If such a charter existed in Los Angeles, for example, politically-minded men would not seek the office of mayor, and they could do no harm if they did. Political hangers-on and perpetual office-seekers who infest the City Hall in the name of public service would be turned out to grass, and would be compelled to ply their trafficking for jobs elsewhere. This is a desirable end. Will it work out? Only time will tell.

The city-manager system has not led to an entire divorcement of the office from politics. The decisions of the council are sometimes political, and their execution becomes political as well. In the city of Pasadena, California, Mr. C. W. Konier had served the city efficiently as manager for a number of years, having been appointed to the position from the post of superintendent of the light and water department. The council passed a resolution that members of the police force adhering to the Ku Klux Klan should be discharged if they continued their membership, and Mr. Konier enforced the resolution. The elections returned a new council, which dismissed Mr. Konier and reinstated the discharged Klansmen. The political repercussions of the enforcement of political decisions are almost inescapable, and friends of the city-manager plan must face such difficulties until the political and administrative functions are fully divorced.

READING NOTES

The President

The formation of the executive department under the Constitution should receive the attention of the student. Federalist opinion as to executive power and the position of the President is disclosed in The *Federalist,* Nos. LXIX-LXXII. The need of a strong executive is argued in No. LXX. The suggestions contained in the several plans for the organization of a government, including the debates thereon, are set forth in the *Notes* of the Convention, by Madison, and by Yates. These documents may be found in Farrand's *Records of the Federal Convention,* three volumes.

The nomination and election of the President is discussed in Bishop's

Presidential Nominations and Elections. The most celebrated election contest is described by Haworth in his *Hayes-Tilden Disputed Presidential Election of 1876.* The student should refer to Dougherty's *Electoral System of the United States.*

A few of the Presidents, upon retirement, have written their observations regarding the presidency. The most valuable and most balanced of these works is Taft's *Our Chief Magistrate and his Powers.* It treats of the constitutional powers of the President, and illustrates their application through reference to striking examples. Mr. Taft presents the "constitutional" point of view. On the other hand, Mr. Roosevelt, in his *Autobiography,* sets forth a distinctly radical view as to presidential authority. Grover Cleveland, in *Presidential Problems,* defended the principle of executive independence.

The war powers of the President are described in Berdahl's *War Powers under the Constitution of the United States.* Phases of the constitutional powers of the President are presented in Sutherland's *Constitutional Power and World Affairs.* Methods of the executive department are presented in Finley and Sanderson's *American Executive and Executive Methods.* Treatises on the Constitution and constitutional law give attention to the President's powers.

The legislative power of the President is fully discussed in Mason's *Veto Power.* Woodrow Wilson described the failure of the executive and legislative departments to coördinate in his celebrated *Congressional Government.* The relations of the executive and the legislature are further developed in Black's *Relation of the Executive Power to Legislation. A New Constitution for a New America,* by William McDonald, is a plea for cabinet government in the United States, together with the suggestion of a wholesale alteration of the Federal Constitution.

Stanwood's *History of the Presidency* is an excellent chronological study of the office of the chief executive. The state papers of the Presidents are collected in Richardson's *Messages and Papers of the Presidents.* The state papers of President Wilson may be found in *The Messages and Papers of Woodrow Wilson.*

The State Governor

One of the gaps in political science is a comprehensive book on the state executive. The student is referred to Finley and Sanderson's *American Executive and Executive Methods* for a comprehensive survey of the office. Much valuable material may be found in Mathew's Principles of *American State Administration.* Additional material may be found in Schouler's *Constitutional Studies, State and Federal;* and in Reinsch's Readings on *American State Government.* Appropriate chapters on the office of governor are included in the textbooks on state government by Dodd, Holcombe, Mathews, and Kimball. Briefer mention is made of the office in the standard works on the American government, by Munro, Beard, and Ogg and Ray.

The Mayor

There is no comprehensive independent work on the office of mayor. The student must find his information in many places. Chapters on this office may be found in the general works on municipal government and administration, including Munro, Beard, Fairlie, Maxey, Goodnow and Bates, Anderson, and Reed. An interesting study is by Story, "The American Municipal Executive," *Univ. Illinois Studies,* VII, No. 3. An article by one of America's foremost mayors is that of J. P. Mitchel,[1] "The Office of Mayor," *Acad. Polit. Sci. Proceedings,* V. 479–494. Mr. Mitchel was for one term the "fusion" mayor of New York City.

Commission and City-Manager

Chapters on the commission and city-manager plans may be found in the textbooks cited above. The more important special books follow: Woodruff (ed.), *City Government by Commission;* Bruère, *The New City Government;* Chang, *History and Analysis of the Commission and City-Manager Plans of Municipal Government;* Crane, *A Digest of City-Manager Charters;* Toulmin, *The City Manager;* and Woodruff (ed.), *A New Municipal Program.*

[1] Deceased.

CHAPTER VII

THE LEGISLATURE

Lawmaking is one of the principal functions of the modern state. Legislative bodies grind out statutes at extraordinary speed. Nearly every conceivable subject comes in for a share of treatment at the hands of lawmakers, either by way of regulation or by way of repression. In recent times the conviction has spread that it is possible to multiply statutes to such an extent as to nullify their effectiveness. If ignorance of the law is no excuse for violating it, and if an endless stream of complicated enactments contributes to ignorance, it can readily be seen that obedience to law, and good citizenship generally, are closely related to the science of legislation. The ancients were not at all troubled with problems of lawmaking; they took their law where they found it, whether in custom or in the will of the gods, and devoted their attention to administration. But with kaleidoscopic changes in social and industrial organization, custom cannot be taken as the sole guide of human affairs, because it is static. Custom is like a cake which hardens with time: to change it is to break it. The common law failed to adjust itself to changing conditions of life; hence the need for enactments. Flexibility in the protection of rights, the suppression of wrongs, the regulation of conduct, and the promotion of general welfare, must be achieved if government is to serve any useful purpose in the modern social and economic order. Legislation, as Professor Freund points out, is both a task and a hazard; but there seems to be no way of avoiding the burden and the risk. The modern state is essentially a lawmaking institution; and since this is true, questions concerning the structure and functions of legislative bodies rank among the most important with which the political scientist has to deal. In the United States there is a three-level hierarchy of legislative bodies, beginning at the top with the national Congress, descending to state legislatures in the middle, and reaching municipal lawmaking bodies at the bottom. With so much machinery oiled and geared to move, it is not surprising that statutes and ordinances multiply without end.

I. The National Legislature

The respect with which the framers of the Constitution regarded the lawmaking department of the new government which they were called upon to set up can readily be inferred from the amount of space they gave to its structure, organization, and powers, and from the prominent position accorded to it in the document itself. Fully half of the Constitution is devoted to an elaboration of the form and functions of Congress, and furthermore it is the first half. Immediately following the preamble, the Constitution declares that "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." The Fathers wished to make sure of laying the foundations deep and broad. Despite the fact that the men who made the Revolution were opposed to the doctrine of parliamentary supremacy, the American colonists had a wholesome respect for parliament. Early colonial assemblies began at once to imitate parliamentary ways and to claim parliamentary powers. Revolutionary state governments centered around the legislative department. The executive was strictly subordinate to the legislature. The failure of the Confederation to measure up to the standards of a real national government prompted the leaders of thought to form a "more perfect union," beginning with a more perfect legislature. The amount of time the framers spent in sketching the broad outlines and filling in the details of the legislative branch is indisputable proof of the concern which they felt for this feature of the Constitution. And it might be added that the legislative department has undergone the least change with the passing of the years. The President is not the figure the framers sketched for us, nor is the Supreme Court; but the Congress of today reflects rather accurately the early image stamped upon it by the Founding Fathers. So carefully and skilfully did the framers work at this point that the growth of an unwritten constitution through custom and usage, while modifying greatly the executive and judicial departments, has not substantially altered what the Fathers wrote in the first half of their Great Charter. Amendments have shifted the balance of the Union somewhat, the direct election of senators has changed the nature of the upper house, and the rise of political parties has nullified to some extent the carefully laid plans to check one house by the other; but Congress remains in its general outlines what it was when it came fresh from the hands of the framers.

The term "congress," rather than "parliament," came into general

usage in the colonies partly because of the spontaneous, informal nature of many of the pre-revolutionary gatherings. The regular legal and political machinery was controlled by the British officials, so that it was necessary to develop a new system of government, with a new nomenclature, in order to give expression to the aroused colonial feeling against the mother-country. A crop of "congresses" sprang up in opposition to certain acts of parliament. In 1765 representatives from nine states assembled to protest against the Stamp Act. That meeting has gone down in history as the Stamp Act Congress. In 1774 the first permanent signs of a growing sacred union appeared in the First Continental Congress. The Declaration of Independence was made by representatives of the United States assembled in a congress. The word is admirably suited to the thing which it expressed at that time. It connotes a gathering of diplomats for the purpose of deliberating and passing upon matters which concern a number of states. It presupposes a community of states and a certain common purpose to achieve common ends. Colonial congresses did possess unity of purpose and were able to appear before the world with a united front, although colonial jealousies were sharp and deep-seated. That the framers of the Constitution should have chosen the word "congress" as describing their highest legislative organ, is at once a testimonial to their faith in the old spirit of sacred union and an expression of a hope that the "more perfect union" would perpetuate the best traditions of the best colonial days. In setting up a federal government, too, it was meant that the identity of the several states should not be lost. A parliament might have suggested a consolidated government, such as that located at Westminster; but a "congress" presupposed individual states having the right to send delegates to the central body. The framers recognized that they were building a structure which in some respects had no counterpart in history, and it was only fitting that the name of its central organ should suggest uniqueness. A new federal republic might very properly have as its supreme legislative body a "Congress."

The federal character of the Union is reflected in the federal character of Congress, which is a bicameral body providing for representation both of separate states and of population. There was ample colonial precedent for bicameralism. Early in the history of Massachusetts Bay the magistrates segregated themselves into a separate body, retaining a veto on the acts of the lower house. With very few exceptions the revolutionary state constitutions followed colonial examples in this respect. The Confederation, it is true, departed from

this principle, and with no encouraging results. It possessed a unicameral legislature, and was in fact little more than a congress of ambassadors with very limited powers. The "more perfect union" had to be given larger powers, and it was held to be dangerous to endow a council of a league (as the Confederation was regarded by the men who made the Constitution) with more extensive power. If more weight is added to the roof of a building, some changes may be necessary in the underpinning. The increased power of Congress was to be balanced by its division into two parts—a House of Representatives and a Senate. This was strictly in accord with the English theory of government championed in the colonies by John Adams and others, as opposed to the French theory of concentrating power in one center. Rousseau was opposed to the separation of powers and to bicameralism; and he was followed in France by Turgot, Condorcet, and others. Montesquieu, on the other hand, favored the separation of powers, regarding it as a distinctively English principle; and he was followed in the colonies by John Adams and others. The Constitution of Massachusetts of 1780, drawn up chiefly by Adams, follows the English theory. This example, together with Adams' polemical writings against the French theory and in favor of the English theory, were before the Fathers when they drew up the Constitution of the United States. A practical reason for the bicameralism of Congress was the compromise between the large and small states in regard to the matter of representation. The small states stood for Simon-pure federalism, that is, for equal representation of the individual states; while the large states wished representation according to population. The compromise that was struck gave equal representation in the Senate and representation according to population in the House of Representatives.

The democratic branch of the national legislature was meant to be the House of Representatives. Much was said about the rights of the people during the Federal Convention, and there was a strong current of feeling that at least one branch of Congress should rest directly upon a popular mandate. Accordingly the House of Representatives is composed of members chosen every second year by the people of the several states. A comparatively low age-limit is fixed for membership, so as to embrace a wide range. No one, it is provided, shall be a member of the House of Representatives who has not attained the age of twenty-five years and is not a resident of the state wherein he is chosen. The latter clause makes it impossible to keep able men in office if they are defeated in their home constituencies. This, however,

is not always the case elsewhere. Only recently the Premier of the Dominion of Canada failed of reëlection to parliament. Under the American system, that body would have been deprived of his services. But he ran again in a far-away constituency, in a bye-election, and was successful. The constitutional requirement of residence tends toward provincialism in American politics, and lays emphasis on the representation of local interests. The Constitution requires only that the representative shall reside in the state from which he is returned; it is custom which has narrowed residence to the district. A distinction is made between native-born and naturalized citizens in the definition of qualifications for membership. Foreign soldiers had fought along with colonial troops in the War for Independence, and provision was made for their entry into the House of Representatives, together with other foreigners who might be naturalized.[1] The first Congress under the Constitution was to meet in 1790, just seven years after the Peace of Paris (1783). Probably the provision that no person should be a representative who had not been seven years a citizen of the United States was intended to facilitate the entrance into political life of this foreign element which had rendered excellent service to the country. The determination as to who shall vote for representatives is made by the several states, but subject to the restriction that "electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature." The Fifteenth Amendment prevents states from discriminating against persons on account of race, color, or previous condition of servitude—and to these the Nineteenth Amendment adds sex. But states may allow aliens to vote, and thus the anomaly has been presented of persons who are not citizens of the United States voting to elect members of Congress.

The question of the relation between representation and population was discussed long and earnestly in the Federal Convention. It goes to the very roots of democracy. What part are the people to have in their own government? If one representative is expected to speak and act for a very large group of people, each person of the group will have less part in the government than he would have if the group were smaller. The first Congress was organized under a fixed ratio, New Hampshire having been allotted three representatives, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, etc. It was provided in the Constitution that the basis of representation should be the whole number of free persons, including those bound to service for a term of years, ex-

[1] Charles W. Bacon, *The American Plan of Government* (1916), pp. 44–45.

cluding Indians not taxed, and, in addition, three-fifths of all other persons. Four classes were included here—free persons, indentured servants, Indians, and slaves. Only Indians were to be excluded in making up the computation, and slaves were to be counted at the ratio of five slaves to three white persons. Upon this basis the number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative. Thus was settled, by compromise, the controversy between the slave-holding South and the free North concerning the basis of apportionment. The Civil War put an end to the status of "all other persons" whom the Fathers were unwilling to call slaves, and made necessary a new plan of computation. The Fourteenth Amendment reduced the four classes to two, "the whole number of persons in each state" and Indians not taxed, and provided for a reduction in representation from states where the right to vote was denied male inhabitants twenty-one years of age and citizens of the United States. Now, by an act of Congress passed in 1924, native-born Indians are made citizens of the United States. Thus in little less than a century and a half the four original classes contemplated by the framers have been reduced to one.

Provision is made in the Constitution for a decennial re-apportionment. The first enumeration was to be made within three years after the first meeting of Congress, and others were to follow every ten years. The House of Representatives began in 1789 with a membership of 65, which number today has increased to 435. There are other lower houses among the governments of the world which are larger, but the fact is that our House of Representatives is too large for effective work as a body. It is unwieldy. If democracy is government by discussion, there can be little democracy in very large assemblies, for mere size renders deliberation impossible. The real work is put off on committees, and the House as a body confines itself to ratifying or opposing what has been decided in committee-rooms. There is a rather general conviction now that the House of Representatives has reached its limit in size, and that further re-apportionment would be only a re-adjustment of representation. If the total population of the United States were divided by 435, the ratio might reach one for every 230,000. If the population of a state were divided by this ratio, the quotient would represent the number of members in the lower house to which the state is entitled. The re-apportionment of 1911, based on the census of the preceding year, did not diminish the representation of any state, and added only thirty-six new members to the House of Representatives. In 1921 Congress would normally

have made its decennial re-apportionment, based on the census of 1920; but nothing was done. The members seemed to sense the difficulty of re-apportioning without enlarging the number of representatives beyond all reasonable bounds. It was held that the provision in the Constitution relating to re-apportionment was not mandatory, but optional. Recently the question has been raised in Congress, and the position taken that an election under the present system might be thrown into the courts to test its validity, on the ground that a defeated candidate might have been elected under a system of re-apportionment according to the Constitution. It was pointed out that the electoral college following the next presidential election will be based upon a census taken eighteen years previously. In a close election the defeated candidates might be unwilling to accept defeat without resort to the courts. Seemingly Congress would do well to obey the specific duty placed upon it by the Constitution and make a new apportionment under the census of 1920.

The Constitution leaves to the states the determination of the time, place, and manner of holding elections for senators and representatives, but grants to Congress the power to make or alter by law such regulations, except as to the places of choosing senators. Until 1842 Congress left the whole matter to the states; but in that year it passed an act providing for congressional districts, composed of "contiguous and compact territory containing as nearly as practicable an equal number of inhabitants." By subsequent legislation Congress has authorized a state which has been allotted an increase in its representation to keep its districts intact and elect its additional congressmen at large, or, in case of a decrease, to elect all of its representatives at large. The district system provides for minority representation. In Republican states the Democrats may capture a district or two, whereas if all congressmen were elected at large the majority party would sweep the field. But the manipulations of party-managers have at times arranged congressional districts so as to make the state safe for the dominant party. By drawing district lines in such a way that the electorate of one party are massed in a few districts, the other party may capture and retain a larger number of districts, with slight pluralities in each one. This is known as "gerrymandering." It means an arbitrary districting of a state so as to favor the majority party by so distributing its voting strength that it will hold the balance of power in as many districts as possible. It attempts to weaken the opposite party by concentrating its voting strength in a few districts, each with overwhelming pluralities. It

is as though the ammunition of one army were mostly concentrated in one sector of the front, and the ammunition of the opposing army were scattered over a number of sectors. The firing of the first army in its ammunition sector would be very deadly, but its other sectors would be left either undefended or very poorly defended, whereas the firing of the second army would be equally distributed all along the front, resulting in a general effectiveness sufficient to win the engagement. If the Republicans "gerrymander" a state they will see to it that the Democrats have plenty of "ammunition" in a few districts, and have little if any in others; whereas the Republicans will have sufficient "ammunition" in a large number of districts to rout the enemy in every engagement. Politics is not unlike war; the capturing of public favor proceeds according to much the same rules as the capturing of an enemy position. In 1872 Congress enacted a law providing that congressmen should be elected by secret ballot, and a year later fixed by law the time of congressional election—the first Tuesday following the first Monday in November of every second year. Vacancies in the House of Representatives are filled by writs of election issued by the executive authority of the state.

Members of the House of Representatives—the latter being the democratic branch of the legislature—are elected for only two years, as compared with the six-year term of senators. It was the thought of the Fathers that in order to keep representatives responsive to the will of the people a rather frequent general election was necessary. In fact, revolutionary theory favored a one-year term of office. But a complete renewal of the House of Representatives every two years was considered sufficient safeguard against governmental usurpation and tyranny. But curiously enough, the scheme has so worked out that it is possible for the House of Representatives to be unrepresentative, owing to the lapse of time between the election and the first meeting of Congress. A member of the House of Representatives, elected in November, will not take his seat until December of the year following —thirteen months later—unless Congress is meanwhile called in special session; and during that interim the old Congress, perhaps repudiated by the voters, is meeting and passing measures. It may be a peace-time Congress called upon to make war, or a war-time Congress called upon to wrestle with the problems of peaceful reconstruction. The arguments in favor of this long lapse of time are, first, that in the early days means of communication were bad, so that it was necessary to allow for considerable time between elections in November and the meeting of Congress; and second, that even with

greatly improved facilities for travel and communication a certain period of time is required to permit the country to settle down after the hysteria of a general election. But it would seem that thirteen months is a longer time than the country needs to settle down; and there is some danger of its settling into forgetfulness of what is going on. Accordingly there has been considerable agitation, led by Senator Norris, to advance the time of the meeting of Congress, leaving at the most an interval of three months between elections and the opening of Congress. Such an arrangement would tend to make the House of Representatives more representative of the will of the people, more responsive to their mandates, and better fitted to solve the problems current at the time of election. In a sense, it would be an approach to the responsiveness of the cabinet-parliamentary system. It would help to fulfil the desire of the Fathers that the lower house should be founded upon the will of the people.

The upper house, or the Senate, was intended to reflect the more conservative elements of the nation. It was meant to be a bulwark of property rights against attempts at confiscation on the part of legislative majorities. The age requirement for senators, their longer term of office, and their originally indirect election, furnish evidence that the framers wished to remove them farther from the people than the representatives would be. A senator must have attained the age of thirty years, must have been a citizen of the United States for at least nine years, and must reside in the state for which he is chosen. Senators are elected for a term of six years, one-third of them going out every two years. This provision gives the Senate a more definite identity and a greater continuity than the House of Representatives possesses. Moreover, senators are frequently reëlected, some having served continuously for a generation or more. The framers provided that senators should be elected by the state legislatures, partly because senators were to represent the states and not population, and partly because the intention was to remove them from the currents of popular majorities.

The Senate was to represent and perpetuate the principle of federalism, namely, the equality of states in a federal republic. In the Convention at Philadelphia the representatives of the small states feared that a consolidated union might be formed, dominated by the large states, such as New York, Pennsylvania, and Virginia. They insisted, therefore, that the fundamental principle of the Confederation, that is, equality of the member-states, should be preserved in the new Union. Furthermore, certain classes, such as the farmers and slave-

owners, were fearful that the manufacturing and commercial classes might discriminate against them in legislation. After extended and sometimes heated discussions, a compromise was struck establishing equal representation in the Senate and proportional representation in the House of Representatives. A part of the compromise was the provision that bills for raising and appropriating money should originate in the House of Representatives and not be amended in the Senate, later modified to read: "All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills." It should be remembered, however, that senators are not ambassadors; they do not cast the vote of their states as political entities in a conference of ambassadors. Each senator has one vote. Not infrequently the representation of a state in the Senate is divided between the major parties, and the vote of that state is not cast as a unit. The underlying principle of the upper house is that of a congress of diplomats, but the provision that each senator shall have one vote greatly modifies that principle. With the growth of democratic sentiment there developed an agitation looking toward direct election of senators by popular vote. Some states took a short cut and brought pressure to bear upon their legislatures to elect as senators those nominated in direct primaries. At length, in 1913, the Seventeenth Amendment was added to the Constitution: "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof for six years; and each Senator shall have one vote." The only provision in the Constitution which cannot be amended in the normal way is that relating to equal suffrage in the Senate; no state without its consent can be deprived of equality of representation in the upper house. This goes to the root of the original compact. The Constitution could not have been adopted without some such compromise.

The two houses of Congress are substantially on a parity in regard to their rights and privileges. According to the Constitution, revenue bills must originate in the House of Representatives, but the provisions that the Senate may amend them nullifies the effect of the prerogative. The House chooses its Speaker, while the Senate is presided over by the Vice-President of the United States. The House impeaches, and the Senate sits as a court to try impeachments. The Senate has certain exclusive prerogatives in regard to foreign affairs and the confirmation of appointments. But in general the rights, privileges, and immunites of the two houses are identical, and many of the provisions of the Constitution relating to organization, discipline, and immunities,

together with the amending process, apply equally to both houses. Congress meets normally once a year, and the President has power to convene both houses, or either of them, in special session. The "long" session lasts from December of the odd-numbered years on into the summer; the "short" session, opening in December of the even-numbered years, is brought to a close on March 4. A majority of each house constitutes a quorum for the transaction of business, but a smaller number may adjourn from day to day, and may compel the attendance of absent members. In determining the presence of a quorum the Clerk notes and records in the Journal the names of those who are present but do not vote. Each house determines its own rules of procedure. Out of this provision has grown the elaborate committee system and the involved parliamentary procedure under which business is carried on in Congress. Each house keeps a Journal of its proceedings and publishes to the world what is done, except matters requiring secrecy. At the request of one-fifth of the members present the "yeas" and "nays" on any question in either house are entered in the Journal. This provision makes it possible for the electorate to judge the record of their representatives in Congress.

Each house is the judge of the qualifications, returns, and elections of its own members. Quite recently the Senate was called upon to decide the Steck-Brookhart controversy, passed on to it from Iowa. More than a thousand citizens of Iowa, when voting for Daniel W. Steck for Senator, marked their ballots with an arrow, contrary to the election laws of that state. When these votes were thrown out by the election judges, as required by law, Smith W. Brookhart was declared elected and took his seat in the Senate. But the election laws of Iowa were not final on that point; the contest was brought before the Senate. Ponderous arguments based on the law and evidence were presented, but the decision of the Senate was colored by political considerations. Twenty-nine Democrats and sixteen Republicans voted for Steck, himself a Democrat, while thirty-one Republicans, nine Democrats and one Farmer-Labor senator voted for Brookhart, a Republican. The judicial element was not prominent. It was conceded that the laws of Iowa had been violated, but the intention of the voters who had marked their ballots with arrows was held to be good. It is now generally thought that such contests would be decided more impartially, and more in accordance with the principles of law and evidence, if they were handed over to the judiciary. Each house has the right to punish its members for disorderly behavior, and with the concurrence of two-thirds to expel a member. William Blount was

expelled from the Senate in 1797 for stirring up the Indians, and thirteen senators were expelled during the Civil War for adhering to the Confederacy. Neither house has the right to adjourn for more than three days without the consent of the other, or to remove to any place other than that in which the two houses are sitting. Freedom of speech and from arrest are guaranteed to members of Congress during the sessions and while they are going to and from the seat of government, except in case of treason, felony, or breach of the peace. No person can hold any office under the United States and still remain a member of either house, and no member can resign and accept any office under the authority of the United States, if such office was created or the emoluments thereof were increased during his term in either house. The salary of members of Congress is fixed at $10,000 a year, with allowances for mileage and clerk hire. The privilege of "franking" mail, if estimated in terms of money, would be a substantial addition to the perquisites enjoyed by members of Congress.

A newly elected House of Representatives meets on the first Monday in December and is called to order by the Clerk of the preceding House. After the roll is called and the oath of office is administered, the House proceeds to the election of its officers—the Speaker, a Clerk, a Sergeant-at-arms, a Doorkeeper, a Postmaster, and a Chaplain. The rules of the preceding Congress are adopted, if there is no objection or no desire on the part of any members to amend them. The Speaker and other officers are actually selected by a caucus of the majority party. In the same way the membership of the important committees is made up. The direction of the work of the committees and the shaping of the policies of the party are really in the hands of the majority caucus. The important committees in the lower house are those on Ways and Means, Appropriations, Rules, the Judiciary, Banking and Currency, Interstate and Foreign Commerce, Rivers and Harbors, Post Offices, and Post Roads, Military Affairs, Naval Affairs, Agriculture, Public Lands, Labor, and Pensions. Prior to 1911 the Speaker named the committees and supervised their labors, but in that year a revolution in procedure deprived the Speaker of that power and lodged it in the House itself. In 1919 the Republicans created a Committee on Committees and vested it with the right to select the Republican members of the standing committees. The chairmanship of a committee is assigned on the basis of seniority. It is the Committee on Rules which holds the whip-hand in the House of Representatives. Business can be hastened or retarded, interrupted or continued, by means of special rules reported by this committee. It

is the driving-power of the majority machine. There is also an extra-legal body, called the "steering committee," at the beck of the majority floor-leader, which selects from the great mass of bills those of most importance and most likely to pass, and seeks with the aid of the Committee on Rules to get them through the legislative hopper.

The Senate is organized along much the same lines as the House of Representatives. The same elaborate system of committees, the same type of party caucuses, the same rule of seniority, a "steering committee," and officers similar to those found in the House all form part of the machinery of the Senate. The outstanding senatorial committees are those on Finance, Foreign Relations, the Judiciary, Commerce, Military Affairs, Naval Affairs, Interstate Commerce, and Pensions. In 1921 several useless committees were discontinued, reducing the whole number from seventy-four to thirty-four. The House of Representatives has about sixty permanent standing committees. In the Senate party caucuses appoint Committees of Selection, which assign members to their various posts, including chairmanships. These assignments receive a preliminary ratification by the caucuses, which is made final by the Senate itself. The Senate has its rules and traditions; but there has long been one notable difference between its procedure and that of the House of Representatives. The Senate, being a relatively small and compact body, could permit unlimited debate without serious consequences, except on occasion, and so a tradition of freedom in debate has grown up there. At times, however, this has been turned to abuse in the "filibuster," with the result that much-needed legislation has been blocked by a handful of stubborn and determined men. In 1917 a modified form of closure was adopted. On petition of one-sixth of the senators, followed by a two-thirds vote in the affirmative, the matter before the Senate becomes "unfinished business," and the members are limited in debate to one hour each. But since there are ninety-six senators, each entitled to one hour's time, the debate might conceivably drag along for eight days of twelve hours each. Vice-President Dawes has inveighed strenuously against the Senate's rules in this regard; indeed, he even attempted to carry his message to the country, but he did not succeed in arousing much enthusiam. There is a feeling that if party leaders postpone the passage of an important measure until the last hours of the session, the blame attaches to them if it is killed by "filibuster." However, it is possible that the Vice-President's campaign had some effect, because the Senate did invoke the closure in the debate on the World Court.

In order to discover what the functions and powers of Congress are, we must look beyond the Constitution. The framers of the instrument intended it to be in part a skeleton outline, to be filled in as the national life expanded and developed. They authorized Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." They departed from the phraseology of the Articles of Confederation, which limited the powers, jurisdiction, and rights of Congress to what was *expressly* delegated. Under the Confederation there were no implied powers; but under the Constitution the scope of Congress was greatly extended by the doctrine of implication. The cornerstone of the edifice is to be found in the decision of Chief Justice Marshall in *McCulloch v. Maryland.* He said: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." [1] This is only an elaboration of Madison's axiom in the *Federalist,* "that wherever the end is required, the means are authorized." [2] Once the cornerstone was laid, the building was erected rapidly. And so to determine what Congress may or may not do, it is necessary to turn to the decisions of the courts, which constitute an exact legal commentary on the Constitution. The framers laid the ground-plan; Congress has built the house; and the Supreme Court has checked over the construction work, interpreting the plan and modifying the architecture considerably, sometimes making additions, removing parts, or re-aligning the whole building. It so happened that Alexander Hamilton, who believed in the doctrine of broad national powers, had a prominent part in shaping the policies of the early administrations, and it was his work, supported by the decisions of John Marshall, which gave to the interpretation of the Constitution the scope and flexibility which made possible a free, sovereign, and independent, national state. A narrower construction might have made of the Constitution a strait-jacket, confining the powers of Congress to small compass; but the broad construction of Hamilton and Marshall made it an easy-fitting garment, allowing freedom of movement and growth.

It is sometimes said that all the legislative power of the nation is vested exclusively and permanently in Congress. This is not strictly correct. According to the Constitution, "All legislative powers *herein granted*" are vested in Congress, but there are legislative powers

[1] 4 Wheaton, 316, 421.
[2] *Federalist,* No. XLIV.

inhering in the nation which are not granted to Congress. The Tenth Amendment makes this clear beyond all doubt in declaring that: "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." Reference has been made to the letter of the Circuit Court for the District of Pennsylvania to the President of the United States, pointing out that the whole legislative power of the United States was not vested in any organ of government. An important part of that power was exercised by the people themselves when they ordained and established the Constitution. Thus Congress possesses only delegated, enumerated, and defined powers; it acts as an agent for its principal, the people. True, its instructions are couched in broad terms, but they are instructions nevertheless. Congress has no inherent sovereignty, despite averments to the contrary. In 1906 the Supreme Court definitely repudiated the doctrine of inherent powers in these words: "But the proposition that there are legislative powers affecting the Nation as a whole which belong to, although are not expressed in, the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the Constitution is made absolutely certain by the Tenth Amendment." [3] Thus the contention that Congress possesses plenary, inherent powers has been laid to rest. Ours is a government of delegated powers, not *expressly* delegated, but with fixed bounds beyond which the legislature may not go without having its acts declared unconstitutional and inoperative.

It is useful to glance at the powers of Congress through the eyes of the men who made the Constitution.[4] They were living in the shadow of danger. The Confederation had failed to meet the needs of a national government; it had not provided for defense; it had not managed the foreign affairs of the country with skill and determination; it had been unable to regulate commerce; and being unable to raise revenue it had allowed credit, both private and public, to sink to the lowest ebb. It was fast plunging the country into a condition of "national disorder, poverty and insignificance," which amounted to public calamity. Obviously a "more perfect union" would have

[3] *Kansas v. Colorado*, 206 United States, 46, 89–90.
[4] See *Federalist*, Nos. XLI–XLIV.

to remedy these glaring defects in the Confederation. A military power would have to be granted Congress to provide for national defense; a commercial power was necessary to enable Congress to regulate trade relations among the several states and with foreign countries, to the end that peace and harmony might prevail; a taxing power was indispensable to the maintenance of public and private credit; and some general provisions were needed to make effective all the powers granted. Plainly the framers had it in mind to set up a government that was far from a league or association of sovereign states. They envisaged a national state. The additional powers granted, the recommendation that the Constitution should be ratified by conventions elected by the people of the several states, and the nationalizing clause making the Constitution, together with laws and treaties made in pursuance thereof, the supreme law of the land, prove conclusively that the Founding Fathers intended to do more than patch up the old Confederation; they were bent on modeling a new state. In fact, it was declared on the floor of the Convention that the old structure could not bear the new weight which would have to be put upon it if it were remodeled into a national government. Additional powers were imperative; the old league with its unicameral legislature was unable to bear the strain; a new structure with a different scheme of support had to be devised.

One of the basic functions of government is to defend the national territory. Legally the state may not be identical with its territory, but no state can endure for any length of time which is unable to make effective its territorial jurisdiction, both against internal forces of disorder and external threats of invasion. No inconsiderable portion of the power delegated to Congress by the Constitution has to do with national defense. To Congress is given the power to declare war, to grant letters of marque and reprisal, and to make rules concerning captures on land and water; also the power to raise and support armies; to provide and maintain a navy; to make rules governing land and naval forces; to provide for calling out the militia to execute the laws of the land, to suppress insurrections and repel invasions; and finally, to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States. To the states, respectively, is reserved the appointment of officers and the authority of training the militia according to the discipline prescribed by Congress. To this should be added the power to lay and collect taxes for the common

defense, and the exercise of authority over places purchased from the states for the erection of forts, magazines, arsenals, and dock-yards. As compared with the weak and loose-jointed provisions of the Confederation in regard to national defense, the Constitution has a military ring like the clanking of sabers or the rattle of artillery. The Confederation was empowered to build and equip a navy, but there the provision for effective national defense ended. It could do no more than "to agree upon the number of land forces, and to make requisitions from each state for its quota, in proportion to the number of white inhabitants in such state." Thus the states were to raise and equip troops at the expense of the United States, and march them to the place appointed by Congress. This system was a fatal concession to state jealousy and particularism in regard to military matters, and it proved hopelessly ineffective. Hamilton, who knew something about the art of war, was thoroughly disgusted with the inequality, the injustice, and the imbecility of it; it resulted, he declared, in "slow and scanty levies of men, in the most critical emergencies of our affairs; short enlistments at an unparalleled expense; continual fluctuations in the troops, ruinous to their discipline and subjecting the public safety frequently to the perilous crisis of a disbanded army." [5] The Constitution makes short shift of that cumbersome and inefficient arrangement, by one brief clause—"the power to raise and support armies."

The World War brought out in bold relief the war powers embodied in the Constitution. Congress declared war in 1917, and declared peace in 1921. It passed selective draft laws and an insurance act; floated war loans; raised enormous sums of money by resort to drastic measures of taxation; passed the national food and fuel control law; enacted legislation taking over the entire control of the railroads and telegraph lines of the country; enacted war-time prohibition; provided for the commandeering of ships and of the products of factories; and passed the Espionage and Sedition Acts, and also the Sabotage Act of 1918. The National Defense Act of 1916 not only made the militia available for all national purposes, but provided for drafting members of the militia into the federal service as individuals and not as organizations, through an oath of obedience to the federal government as well as to the state governments. Professor Beard lists twenty-one agencies created by Congress to facilitate the prosecution of the war, among them, the War Industries Board, United States

[5] *Federalist*, No. XXII.

Railway Administration, Emergency Fleet Corporation, Food Administration, Fuel Administration, and War Labor Board.[6] The entire resources of the nation were mobilized and made available for the purpose of national defense, even though private rights were seriously restricted thereby. The courts gave wide latitude to their interpretation of "due process" in war-time, virtually conceding that there could be one sort of "due process" in time of peace and another in time of war. If an act of Congress was clearly "necessary and proper for carrying into execution" any of its war powers, the rights of property could not stand in the way. Congress even fixed the intra-state rates of railroads, and the Supreme Court sustained the statute on the ground that it was a legitimate exercise of the war-power. Thus the doctrine of implied powers was pushed so far that it approached the limits of inherent sovereignty. Whatever was necessary to the winning of the war, Congress could do; and that is just what any government of plenary powers can do. Thus in effect Congress possessed plenary powers in regard to national defense and the prosecution of the war.

It is apparent, therefore, that the problem of security bulked large in the minds of the Founding Fathers. Madison put in the first class of powers conferred on the government of the Union, "security against foreign danger." In the second class he put the regulation of intercourse with foreign nations. The regulation of commerce he regarded as only one phase of this general power, which included also the making of treaties, the sending and receiving of ambassadors and of other public ministers and consuls, the defining and punishing of piracies and felonies committed on the high seas, and offenses against the law of nations. The principal power in this group belonging exclusively to Congress is the regulation of commerce; and for our purposes it may be broadened to include commerce among the states and with the Indian tribes. The Confederation had failed to provide for harmonious intercourse among the states, just as it had failed properly to regulate intercourse with foreign nations. It did not possess the power to do either. It could not prevent trade discriminations among the states, or foreign discrimination against the United States. Sovereignty is the right to control the affairs of a nation, on a given territory, insofar as they relate to public welfare. Personal opinion and strictly private affairs are exempt from the jurisdiction of the state; but commerce does not fall within this latter class. The word "com-

[6] Charles A. Beard, *American Government and Politics* (fourth edition, 1924), pp. 354–62.

merce'' includes buying and selling, or the exchange of commodities, and navigation, as well as all forms of intercourse and traffic between citizens, including the transportation of persons and property. Buying and selling, intercourse, navigation, and transportation are matters relating to the public good, and are therefore subject to regulation by constituted authorities. Monopoly and restraint of trade interfere with freedom of contract and property rights, and therefore properly fall under the condemnation of law. Congress has exercised its power to regulate commerce, both externally and internally. By the Constitution it is estopped from levying a tax or duty on articles exported from any state, or from giving preference to the ports of one state over those of another, or from requiring vessels bound to or from one state to enter, clear or pay duty in another. But by tariff acts Congress has regulated the flow of goods into the country, at the same time protecting American industry. If the interpretations of our courts are correct, immigration may be regarded in the light of foreign commerce; it is the transportation of persons, and may be regulated also by the power of the government over foreign affairs. American policy on immigration has undergone an evolution from the broad intolerance of the years prior to 1882 to the closely restrictive and selective policy of the present. The United States exercises its sovereign right to choose from among the strangers who wish to enter its gates, those who in the light of all the facts may be expected to make the most patriotic and most productive citizens. Congress has enacted navigation and inspection laws, and has aided shipbuilding and shipping by loans and subsidies. Embargoes fall within the commerce clause.

The establishment of post-offices and post-roads is an aid to commerce, as is also the coining of money, the punishment of counterfeiting, fixing the standards of weights and measures, uniform bankruptcy laws, and the proving of public acts, records, and judicial proceedings in the states.

The power to regulate interstate commerce is a mighty engine of control. It brings within the purview and regulation of Congress, not only the transportation facilities of the country, but also large corporations doing an interstate business, and all agencies affecting the health and morals of the people, insofar as they are related to interstate commerce. To remedy the evils of railway competition, Congress enacted the first interstate commerce law in 1887, and created an Interstate Commerce Commission, independent of the Department of Commerce, to administer the statute. This now consists of eleven

members appointed by the President for a term of seven years and paid $12,000 a year each. The commission is empowered to regulate the business of transporting persons and freight (including sleeping-car companies), the pumping of oil through pipe-lines, the services of telephone and telegraph, cable and wireless. It can fix rates to be charged for services, and prescribe that they be just and reasonable. It is a quasi-judicial body with authority to summon witnesses, compel the production of books and papers, hear complaints, issue orders, and make decisions. Not content with regulating the transportation of persons and goods, and the transmission of intelligence, Congress embarked in 1890 on a policy of checking unreasonable restraints of trade in the form of large and monopolistic combinations of capital. The Sherman Anti-Trust Law makes illegal every contract, combination, and conspiracy in restraint of trade or commerce among the several states and with foreign nations. At first the law was enforced by the Department of Justice alone. But as a result of a need for clarification of the law, together with some special administrative agency to enforce it better, the Clayton Anti-Trust Law was passed in 1914, creating the Federal Trade Commission. The latter consists of five members appointed by the President for a term of seven years. It is charged with the duty of supervising and regulating corporations, partnerships, and persons engaged in interstate commerce, except such as come within the jurisdiction of the Interstate Commerce Commission. Under the commerce clause Congress may compel arbitration of disputes between employers and employees on interstate railroads, or it may fix wage scales, if necessary, to insure continuity of service. The federal government does not possess general police powers such as the states possess, but through its power to tax, to regulate commerce, and to control the mails, it has been able to exercise authority to protect the health, safety, morals, and convenience of the community. Acts requiring the installation of safety-appliances on interstate railroads, employers' liability, lottery, and white-slave acts, as well as food and drug acts, have been passed by Congress under the commerce clause. But the first Child Labor Act of 1916 was declared unconstitutional on the ground that goods made by child labor were harmless in themselves, that manufacturing in the state was subject to the police power of the state, and that to give such a power to Congress would destroy our dual system of government. There are limits, then, beyond which Congress may not go in the regulation of commerce.

It is interesting to note that Madison linked the levying of taxes

and the borrowing of money with national defense. Moreover, the wording of the Constitution lends color to this view: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."[7] Objection was made to this section of the Constitution on the ground that it gave to Congress an unlimited commission to exercise every power which might be alleged to be necessary for the common defense and general welfare. But Madison held that the general grant of power contained in this section was limited by the enumeration of particular powers following; that is to say, the taxing power did not confer upon Congress the right to legislate in *all* cases. President Monroe held that Congress had unlimited power to raise money, but that in making all appropriations it should exercise care not to go beyond the purposes of common defense and general welfare.[8] The Supreme Court, in *Loan Association v. Topeka,* held that the exercise of the taxing power was in its very nature unlimited in extent, given the purpose or object for which taxation might be lawfully used. "The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people."[9] But there can be no lawful tax for private purposes. Taxation for the benefit of any class of manufacturers is unwarranted. The object must be public and relate to the general good. So Congress has a general power to lay and collect taxes of every kind without restraint, except on exports. Duties, imposts, and excises must be uniform throughout the United States, and originally capitation or direct taxes could be laid only by apportionment among the states, according to population as shown by the census. The distinction between direct and indirect taxes gave the courts much trouble. A capitation or poll tax is plainly direct, because it is levied directly on persons. It was held that a tax on carriages was not direct, because it was not apportionable. Taxes on real estate and on persons were held to be direct. The Supreme Court reversed itself on the nature of income taxes, holding at first that they were indirect, and later that they were direct, as being taxes upon property. To give Congress power to levy upon incomes the Sixteenth Amendment was adopted, reading as follows: "The Congress shall have power to lay and collect taxes on incomes, from whatever source

[7] Art. I., Sec. 8, Subd. 1.

[8] Charles K. Burdick, *The Law of the American Constitution* (1922), p. 181.

[9] 20 Wallace, 655, 663.

derived, without apportionment among the several states, and without regard to any census or enumeration." Taken in its widest sense, this amendment would give Congress power to tax the agencies of a state. "From whatever source derived" is unlimited in its scope; but the courts have held that the amendment does not extend the taxing power to new or excepted objects. It merely removes the necessity of apportioning direct taxes. Indirect taxes are duties, imposts, and excises. Customs levied on goods entering the country, sales taxes, federal corporation taxes, charges levied on tobacco and spirituous liquors, all are indirect, because they are laid, not upon the property itself, but upon the privilege of importing, manufacturing, or retailing commodities, or doing business in a certain manner. The War Revenue Act of 1917 raised enormous sums from incomes, excess profits, beverages, tobacco, automobiles, chewing gum, cameras, cosmetics, admissions and club dues, stamp taxes, inheritances, and increased postage rates.

Congress has not been slow to use its taxing power as a means of regulation and even of destruction. "The power to tax," it has been declared, "involves the power to destroy." Operating on this principle, Congress imposed an excise tax of ten per cent upon currency issued by state banks, for the purpose of restraining the circulation of notes not issued under its authority, thus eliminating the competition of state bank notes with the new national bank notes. The act of 1866 imposing this tax was upheld as constitutional on the ground that Congress had to be given power to secure a sound and uniform currency for the whole country. In 1912 a prohibitive tax of two cents a hundred was laid upon white phosphorus matches, thus preventing their manufacture and sale. Oleomargarine is taxed, ostensibly as a means of raising revenue, but really to prevent deception. Thus a federal police power is in the making; it is evolving out of the commerce and taxation clauses of the Constitution. But its development received something of a setback in the second Child Labor case. By act of Congress of 1919 a tax of ten per cent was levied on the net annual income of persons who employed children in any mine or factory. The question which the court had to decide was: Is this tax intended to raise revenue, with only an incidental restraining and regulatory effect, or is it intended to penalize and prohibit the employment of children in industry? The court held that the tax was in the nature of a penalty, and therefore could not be imposed under either the tax or the commerce clause of the Constitution.[10] The fate of the recently

[10] *Bailey v. Drexel Furniture Co.* 259 United States, 20.

proposed Child Labor Amendment (only four states having ratified it) proves conclusively that the people of the country are reluctant to extend federal police powers. The states are the natural and safe custodians of police powers, because they can adapt their regulations concerning health, safety, and morals to the peculiar circumstances of time and place. Uniform, nation-wide regulation of private conduct has gone about as far in this country as it seems destined to go for a while.

Thus the three great germinal powers of Congress relate to national defense, commerce, and taxation. But the list of congressional powers is long. Madison, despairing of being able to fit them all into any scheme of classification, made a sort of catch-all group which he entitled "certain miscellaneous objects of general utility." He was, it is true, considering all of the powers of the national government, not simply the powers of Congress; but much of his classification applied to Congress. In this catch-all he included the power to promote the progress of science and useful arts by means of patents and copyrights; to legislate for the district chosen as the seat of government and all places used for the erection of forts, magazines, arsenals, etc.; to declare the punishment of treason (but no attainder of treason should work corruption of blood, or forfeiture, except during the lifetime of the person attainted); to admit new states into the Union; to dispose of and to make rules governing the territory and other property belonging to the United States; to guarantee to every state in the Union a republican form of government. This last provision goes beyond the powers of Congress; the power of the executive is invoked to maintain order in the states and to guarantee republican government. The establishment of uniform rules of naturalization falls within the province of the legislature. To Congress also belongs the constituent power of proposing amendments to the Constitution, or calling a convention for proposing amendments, and prescribing the mode of ratification, either by the legislatures of three-fourths of the several states or by conventions in three-fourths thereof. Congress also has an electoral function; it not only judges its own elections, but canvasses the vote of the electoral colleges and, in case of deadlock, chooses the President (the election being thrown in the House of Representatives), or the Vice-president, in the Senate. Likewise it has a judicial function, in the case of impeachments; the House prefers the charges and the Senate sits as a high court of justice. The Senate shares the treaty-making power with the executive.

Thus the legislature seems to be the center of the wheel; from it the

lines of governmental activity radiate. Congress established the executive departments and has supervised their work. In recent years it has spent time and money investigating the affairs of one department or another. It fixes the salaries of cabinet members. On the other hand, to Congress was committed the task of establishing the judicial system, inferior to the Supreme Court. Thus in addition to lawmaking, Congress has administrative functions; namely, the organization, maintenance, and supervision of the executive departments and the organization and maintenance of the judiciary, except insofar as the constitution of the third branch is prescribed by fundamental law. More and more Congress is taking itself seriously as the grand inquest of the nation. It is not content to place statutes on the books; it proposes to supervise the administration of the government. And since it must find ways and means of supporting the administration, in matters of finance, it is only fair that it should possess certain powers of investigation. However, it is possible to spend so much time and effort in ferreting out supposedly weak spots in the administration that little opportunity is left for constructive legislation.

So much power lodged in the legislative branch of the government necessitated a thorough remodeling of the old type of government under the Confederation. A council of a league, vested with all the powers enumerated above, together with a blanket authorization to make all laws necessary and proper for carrying these powers into execution, would have been dangerous in the extreme. This is precisely the way the Founding Fathers felt about the matter. They knew that larger grants of power would have to be made, but they were unwilling to make them to a unicameral legislature, such as the Confederation possessed: hence the bicameral system of the Constitution. The legislative power is lodged in two houses, each intended to serve as a check on the other. Every bill must pass both the Senate and the House of Representatives before it goes to the President for his signature. Furthermore, there was no clear line of demarcation between the executive and legislative departments of the Confederation, if indeed it can be said to have had an executive. But the new Constitution not only drew a line but created an impassable barrier between them. No person holding an office under the United States can be a member of either house during his continuance in that office. This prevents any fusion of powers such as is found in the cabinet-parliamentary type of government. The executive must stay over on his side of the line, and the legislature over on its side. But not content with separating powers and balancing organs of government one over against the

other, the framers placed certain definite restrictions on the power of Congress. In addition to those which have been enumerated above, they are as follows: no bill of attainder or *ex post facto* law shall be passed; no money shall be drawn from the treasury except by law; no title of nobility shall be granted, nor shall any person holding any office of profit or trust under the United States accept any present, emolument, office, or title of any kind whatever from any king, prince, or foreign state, without the consent of Congress. Finally, the original powers of the legislature, along with those of the executive and judiciary, have been modified by amendments. The first ten amendments are generally regarded as a bill of rights limiting the power of government, legislative, executive, and judicial. They provide for the protection of private rights. The Fourteenth Amendment gave Congress new authority in regard to the apportionment and qualifications of its members. The Fifteenth Amendment granted Congress the power to enforce by appropriate legislation the right of citizens of the United States to vote, even against denial or abridgment by the United States, or by any state, on account of race, color, or previous condition of servitude. The Sixteenth Amendment enlarged the taxing power of Congress. The Eighteenth Amendment vested in the federal government police powers with regard to the liquor traffic of the same kind as those possessed by the states, and at the same time charged Congress with the enforcement of prohibition by appropriate legislation. The Nineteenth Amendment simply added the word "sex" to the Fifteenth, but even so it enlarged the bounds of congressional authority.

II. The State Legislatures

In the Federal Convention the rights of the states were balanced against the rights of the people of the whole United States. Just as political theory before the Revolution turned on the nature of the empire, so after the Revolution it turned on the nature of the Union. What part were the states as political entities to have in creating the "more perfect union"? What diminution of statehood, if any, were they to suffer? Was the Constitution to be an organic law for the states or only for the people of the states, individually considered? The polarization of thought in the Convention on these points has already been referred to. The international law conception would have made the states the creators of the Union. They would have retained their freedom, sovereignty, and independence; and the Constitution, so far

as they were concerned, would have been only a compact. The nationalistic conception regarded the Union as the work of the whole people. The states were to surrender a part of their sovereignty and independence, and the Constitution was to be considered the organic and fundamental law for states as well as for individuals. The ultimate result was a compromise, as is well known, between these two conflicting theories. But, on the whole, the balance leaned toward nationalism. The Constitution leaves no doubt as to where supremacy is lodged. "This Constitution, and the laws of the United States which are made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."[11] Not satisfied with a mere declaration of federal supremacy, the founders cemented the union by an appeal to the oath: "The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution."[12] Moreover, the states are prohibited by the Constitution from making treaties or alliances or entering into confederations, from granting letters of marque and reprisal, coining money, emitting bills of credit, making anything but gold and silver coin legal tender in payment of debts, passing any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or granting any title of nobility. States are forbidden to lay imposts or duties on imports or exports without the consent of Congress, except for the purpose of executing their inspection laws, and then the net product of such duties and imposts must be covered into the treasury of the United States; and all such laws are subject to the revision and control of Congress. Without the consent of Congress states are forbidden to lay tonnage duties, to maintain troops or ships of war in time of peace, to enter into any agreement or compact with one another or with a foreign power, or to engage in war, unless actually invaded, or in such imminent danger as will not admit of delay. Finally, the delegation of certain powers to the federal government has operated to deprive the state of similar powers, and the disturbance of the balance of the Union by amendment has served further to circumscribe the power and jurisdiction of the several states.

[11] Art. VI., Subd. 2.
[12] Art. VI., Subd. 3.

Viewing in retrospect the formidable array of powers granted by the Constitution to the federal government and the almost equally formidable array prohibited by it to the states, one is disposed to conclude with Lincoln that the Union is older than the states, and in fact created them. The members of the "more perfect union" have a new status under the Constitution, and they have that status by virtue of the Constitution. But the states are far from being simply administrative areas. The Tenth Amendment, directed against consolidation, explicitly reserves to the states respectively, or to the people, powers not delegated to the United States by the Constitution, or prohibited by it to the states. When brought together within brief compass, the powers possessed by the states form an imposing aggregate. Professor Arthur N. Holcombe has summed up admirably the powers left to the states, including the power: (1) to establish and maintain organized governments, with political subdivisions, provided they be republican in form; (2) to regulate the suffrage, subject to the restraints imposed by the Fifteenth and Nineteenth Amendments; (3) to levy and collect taxes, except upon interstate and foreign commerce and upon instruments of the federal government; (4) to protect the health, safety, and morals of the people, provided no one shall be deprived of life, liberty, or property without due process of law, or be denied the equal protection of the laws; (5) to regulate matters pertaining to religion, education, and public utilities; (6) to create corporations and trusts; and (7) to regulate the institutions of private law, such as the family and property.[13] But it should be remembered that these rights and powers are not delegated, enumerated, and defined in the state constitutions; they are original and inherent. The Federal Constitution and state constitutions place restrictions upon the power of state legislatures. What they have left, is their own by original right. James Bryce explains the peculiar nature of our dual system as follows: "The National Government is an artificial creation, with no powers except those conferred by the instrument which created it. A State Government is a natural growth, which *prima facie* possesses all the powers incident to any government whatever."[14] He was impressed with the nearness to the average citizen of the state's jurisdiction, and its extent. "The State," he writes, "or a local authority constituted by State statutes, registers his [the citizen's] birth, appoints his guardian, pays for his schooling, gives him a share in

[13] Arthur N. Holcombe, *State Government in the United States* (revised edition, 1926), pp. 18–19.

[14] James Bryce, *The American Commonwealth*, 2 vols. (1919–20), vol. I, p. 445.

the estate of his father deceased, licenses him when he enters a trade (if it be one needing a license), marries him, divorces him, entertains civil actions against him, fines him for over-speeding his automobile, declares him a bankrupt, hangs him for murder." [15]

The state legislatures are replicas on a reduced scale of the national legislature. There one finds the same principle of bicameralism, an upper and a lower house—or should they not be described as a smaller and a larger house? The same names are employed—Senate and House of Representatives. In some states the lower house is known as the Assembly, General Assembly or House of Delegates. The same type of officers appear, the House electing its Speaker, and the Senate having a presiding officer imposed upon it by the Constitution, namely, the Lieutenant-Governor. In case the Lieutenant-Governor is absent, the Senate chooses a temporary President. In many other respects having to do with their organization and procedure the state legislatures resemble Congress. Each house is judge of the election, returns, and qualifications of its own members. Each house determines the rules of its own procedure, and possesses the power of discipline and expulsion. Each house keeps a journal of its proceedings. State governments are reproductions on a small scale of the federal government at Washington; but there are a few outstanding points of difference. First, the powers of state legislatures are original and not delegated; second, the bicameral system in the states is not on all fours with the bicameralism of Congress; third, direct government by the people in the states robs the legislatures of some of the power and prestige enjoyed by the national legislature; fourth, party politics in the states is more shifting and uncertain than in the nation as a whole. State parties are little more than factions or blocs, emerging from the unformed sea of public opinion for a brief period of identity, and then lapsing back into the boundless ocean, to be seen no more. Of course, it must not be forgotten that national parties always retain a grip upon state politics, if for no other reason than that senators and congressmen, as well as presidential electors, are chosen on national issues. But there are no state political parties with fixed principles which persist from generation to generation, such as the Republican policy of protection and the Democratic policy of state rights.

The bicameralism of state governments appears today with a question-mark after it; that is to say, there is a growing tendency to ask state legislatures to show cause why their two houses should not be coalesced into one. They may be able to show cause, but there is

[15] *Ibid.*, p. 425.

some disposition to put the burden of proof on them. It must be evident to all that the historic reasons for bicameralism in Congress do not obtain in the states. There are no federal divisions within a state. A state senate does not represent bodies politic in the same way that the United States Senate does; nor are property and social distinctions reflected in legislative bodies today, as they were formerly. The second house in the states represents much the same constituency, segregated slightly differently, as the lower house. Furthermore, the formless and shifting nature of state parties renders a government of checks and balances difficult of operation. There is no means of knowing when a state administration, controlled by a national major party, may be split wide open by the rise of state issues, whereupon a series of deadlocks will ensue. The tie that holds a national administration, the executive and the majority of Congress together, namely, party responsibility, is lacking in the states. When a split comes on state issues, the unity of administration and of legislation is broken, and fragments fly apart as though impelled by an unseen force. Moreover, cities have dared to depart from the time-honored principle of checks and balances in their form of government. Some important cities have dispensed with the mayor-council type of government, and have introduced some form of commission or city-manager plan. Why should the states adhere to the federal system when municipalities are breaking away from it? The answer is that unicameralism has never got a foothold in America, to any considerable extent, in political divisions where important policies having to do with life, liberty, and property are formed and enacted into law. Early revolutionary states experimented with it; Pennsylvania, Georgia, and Vermont tried it, but all sooner or later returned to the federal type. Within recent years proposals have been made looking to a revival of those early experiments, but they have met with little response. During and after the revolutionary period the principle of concentrating authority in one center was advocated in America by those who had been influenced by French philosophy. Turgot criticized the constitutions of American states because they divided and separated powers, and balanced them one against another. He approved the constitution of Pennsylvania which concentrated legislative power in a single-chambered assembly. But John Adams set himself in opposition to that idea, and at the cost of three stout volumes and some constitution-making of his own, he succeeded in stamping bicameralism upon the political institutions of early America, and the impress has not yet faded out. Municipal corporations may tinker with the principle of concentrat-

ing powers, but our states as yet will have none of it. Any political division which has the powers that Professor Holcombe enumerates as belonging to the states, and comes as near to the citizen, touching his life, liberty, and property, his education and his family, as James Bryce depicts the states as doing, should be so organized as to provide for a careful sifting of measures as they go through the legislative hopper and for an effective method of stopping the machinery when there is danger of a surplus or a damaged output. It may be replied that bicameralism in state governments has failed to sift the good from the bad, or even to slow down the legislative mill; that one chamber might give more careful and thoughtful consideration to bills than two chambers do. This may be true; and if it is true the argument might apply to the national legislature as well as to the state legislatures. But Americans are hard to convince that rights are not better protected when bills affecting them must run the gauntlet of two houses than they would be if the same bills were passed upon by a single chamber. A few years ago the lower house in one of our states, carried away with pacificism, put through a bill to abolish the state militia and all forms of military training; but the upper house, not infected with the same virus, refused to pass the bill, and saved to the state an arm of national defense which the founders prized highly—as can be seen from the amount of attention they gave to it and from the fact that Madison ranked first among the powers of the federal government the authority to raise and support armies.

There is no uniformity in the size of state legislatures. Each state determines for itself the size of its Senate and of its General Assembly or House of Delegates. Upper houses range in membership from seventeen in Delaware to sixty-seven in Minnesota. Lower houses are usually large, numbering more than a hundred members in more than half of the states. Arizona and Delaware have lower houses consisting of thirty-five members each, while New Hampshire has a lower house of 418 members.[16] Clearly a reduction in the size of lower houses would operate in favor of better legislation. The Senate of the United States, with ninety-six members, is still regarded as a deliberative body, but deliberation would be facilitated if it were only half its present size. If unicameralism were linked with a drive for reduction in the size of state legislatures, as it sometimes is, it would have an additional claim upon the thought of students of government. Large, unwieldy legislative bodies must of necessity relegate to committees the real work of sifting and passing upon projects of law. The legislature itself

[16] See Walter F. Dodd, *State Government* (1923), p. 164, 166.

tends to become little more than a ratifying agency. It remains, of course, a forum for the discussion of public questions, and an agency of investigation and supervision.

The basis of representation is generally the rule of population. It is customary to take the county as the electoral unit, allotting one or more members in the lower house to each county, and combining counties for senatorial districts, except in case of populous counties which by reason of their size claim the right to constitute a senatorial district and to elect one or more senators. A county may be subdivided into representative districts for the purpose of electing its quota in the state House of Representatives. But the rule of population is not uniform throughout the United States. Some New England states still cling to the old idea of town representation. In the early colony of Massachusetts Bay towns were granted the right to send representatives to the meetings of the General Court. Today the lower houses of Connecticut, New Hampshire, and Vermont are based upon town representation; and Rhode Island clings to the old principle in both houses. With the growth of large cities corporate representation must of necessity depart far from the principle of numerical equality. But, as Professor Dodd points out, inequality is not confined to New England. In New Jersey each county is represented by one senator, although two of the twenty-one counties have a combined population equal to two-fifths of that of the whole state.[17] To apportion representation on the basis of corporate or geographical units, without providing for periodical re-apportionment, is to open the way to gross inequality. Urban centers increase in population much faster than rural districts, with the result that, in the absence of re-apportionment, the cities are governed by the "cow counties." With the growing tendency in certain states to disregard constitutional provisions concerning re-apportionment, the whole problem of representation is becoming more and more acute. In some states machinery for re-apportioning apart from the legislature is provided, but even that does not solve the fundamental problem. It would seem that the numerical principle will have to be modified in some manner. Rapidly growing cities or counties might be limited to a maximum number of members in the one house or the other. For example, the Illinois constitutional convention limited Cook County to one-third of the members of the senate, but left it equal representation in the lower house.[18] Some consideration will have to be given the "cow counties," because of their

[17] *Ibid.*, p. 168.
[18] *Ibid.*, p. 172, note.

place in the economic order. They constitute an integral part of the productive process upon which cities depend for their very existence. Their representation might be based, not simply upon the number of their inhabitants, but upon the importance of their function. If growing cities were to be limited to a fixed maximum of representatives, based, not upon the number of their inhabitants, but upon the importance of their place in the life of the state, this would be equivalent to increasing the representation of the "cow counties." The Illinois convention gave up the idea of allowing Cook County representation in the senate on the basis of population, and raised another question: What influence in the senate can we afford to allow Cook County to have? The answer was that it should have not more than one-third of the senators. The new constitution of the German Republic fixes definite limits to the representation of Prussia in the *Reichstag*. In the United States Senate the principle of numerical equality, in regard to population, is openly abandoned. So it seems that the principle of numerical equality in representation has its drawbacks. In fact, it never has operated as it was intended to operate. Representatives from urban centers always exhibit a political consciousness and a cohesion in voting that is absent among the representatives of rural centers. The farmers have much to learn in the way of bloc voting. That being the case, there need be little fear that numerical under-representation of cities will place them at a disadvantage in legislation. To safeguard the interests of urban centers, some such division might be made as was suggested by the convention in Illinois, that is: let large cities have equal representation in one house and limited representation in the other. Before the problem of representation is solved, the old principle of bicameralism may be found to be very useful.

As there is no uniformity in the size of state legislatures, or in the basis of representation, so also uniformity is lacking in the term of office and in the frequency and the limit of sessions. The majority of the states elect their senators for a four-year term, but there are a number which elect for two years, and one (New Jersey) elects for three years.[19] The term of representatives varies from one year to four years, the majority of the states gravitating toward a two-year term. Sessions as a rule are biennial, but a few states have annual sessions, and one state (Alabama) has quadrennial sessions. Time limits on sessions range from none at all to ninety days. Election of members is, with one exception, by plurality vote. Illinois presents the interesting

[19] See useful table prepared by Professor Dodd, *op. cit.*, pp. 164–65.

experiment of cumulative voting. The law provides that "in all elections of representatives aforesaid, each qualified voter may cast as many votes for one candidate as there are representatives to be elected, or may distribute the same, or equal parts thereof, among the candidates, as he shall see fit; and the candidates highest in votes shall be declared elected."[20] By concentrating votes on one candidate a minority party may elect one representative out of three, in a district sending three representatives to the lower house; and if the majority party scatters its votes a minority party may be able to elect two candidates in a single district. The plan has operated in favor of the two major parties, serving as a scheme of proportional representation; but for the weak minority party or the strong minority party which has failed to concentrate its vote, it has not been serviceable in obtaining representation. Students of the system feel that it has reduced elections to a forecast of party committees, and has lessened the influence of the voter; although, on the other hand, it has reduced the evils of sectionalism and has achieved limited proportional representation, at least insofar as the major parties are concerned.

The business which comes before state legislatures has been classified by James Bryce as follows: (1) ordinary private law, i. e., contracts, torts, family relations, (2) administrative law, including the regulation of local government, public works, education, the liquor traffic, laws concerning corporations, taxation and management of the public debt, (3) measures of a local and special nature, such as chartering gas and water and light companies, incorporating cities and regulating their affairs.[21] Most of the measures which come before state legislatures may be described as "public law," in the continental sense; they have to do with public interests and not with contracts of private law, property, or family relations. The following half-dozen senate bills that were enacted into law and signed by the Governor of the State of Washington during the winter of 1926 at Olympia will illustrate this point. They are taken consecutively as they appear in the report of the proceedings: (1) Bill defining west boundaries of Grays Harbor, Jefferson and Clallam Counties; (2) bill removing limitation of governor in the appointment of members to the State Board of Education; (3) bill providing for four additional Superior Court judges in King County; (4) bill permitting first-class school districts to operate lunch rooms in school districts; (5) bill amending the law relative to the incorporation of fraternal

[20] *Op. cit.*, p. 178.
[21] Bryce, *op. cit.*, vol. I, p. 540–43.

organizations, to permit grand lodges to incorporate; (6) bill placing terminal warehouses under the supervision of the Director of Agriculture; and (7) bill providing for the return of surplus fees collected for horticulture inspection. It is not contended that this set of bills is representative in every respect of all the bills passed by the legislature; but it is a cross-section of what passed through the legislative hopper. There is very little private law, if any, to be found among these bills. A cross-section of house bills that were enacted into law will show the same general trend: (1) bill relating to the taking of deposition; (2) bill relating to service of orders in execution proceedings; (3) bill amending grade-crossing act so that it is not mandatory that both parties pay fifty per cent of the costs; (4) bill repealing an act for the extension of city limits, passed in 1889; (5) bill repealing laws of 1886, 1891, and 1909 relating to bills of lading and warehouse receipts; and (6) bill repealing laws of 1881 relating to Chinese and Canadian thistles. Thus it appears that much of the time of the state legislature of Washington is taken up with passing bills relating to administrative matters, that is, essentially public law. Some matters of private law are sandwiched in—contract, property, and civil procedure coming in for a share of treatment; but the private law of the state is pretty well settled and codified. New developments are most likely to arise in the field of administration, and the regulation of political subdivisions.

State legislatures work under certain known and well-defined limitations, as regards competence, procedure, and the reserved right of the people, in a number of commonwealths, to legislate directly through the initiative and referendum. Owing to a prevailing distrust of state legislatures which grew up in consequence of the use of political machinery for private ends, the people began to write into their constitutions all sorts of limitations upon legislative competence. In addition to bills of rights, which properly represent spheres of immunity from meddlesome legislators, constitutions contain restrictions upon legislative competence in regard to corporations, private and public, taxation, education, and disposal of public lands. Oklahoma lists twenty-eight topics on which special legislation is forbidden. The later constitutions are in reality statute-books filled with regulations concerning public policy. They depart widely from the plan of the Federal Constitution, namely, that only a skeleton outline of organic and fundamental principles should be drawn up, and that the rest should be left to Congress and the President. The tendency in state constitutions is to leave very little to legislative discretion. Between en-

joining upon the members of the legislature what they must do and what they must not do, the people have left little space for the delineation of great, germinal principles which should serve as guides to legislators in the midst of doubt and perplexity. Numerous restrictions, too, have been placed upon legislative procedure. The drafting of bills, the enacting and re-enacting and amendment of laws, secret sessions, changing the purpose of a bill during its passage, all has been defined and regulated by constitutional provisions. An interesting question in procedure arose in the legislature of the State of Washington during the session of 1925–1926. The Governor's veto of an educational appropriation was overridden by a two-thirds vote of the senate; but it was sustained by the lower house. At the time the house rules provided that there could be no reconsideration of a vote on the Governor's veto, but subsequently the rules were amended so as to permit such reconsideration. A reconsideration was then had, and the bill was passed over the Governor's veto and certified to the Secretary of State. In response to the Governor's challenge that the enactment was irregular, the Attorney-General ruled as follows: "It is my opinion that the house, by a majority vote, has power to amend its rules. If a legislative body has power to make rules by a majority vote, it would seem entirely consistent that a majority has power to amend such rules. Furthermore, inasmuch as this bill is valid on its face, it has been repeatedly held by the Supreme Court of this state that the courts will not go behind the face of a legislative enactment to determine whether or not the mode pursued by the Legislature in enacting such legislation is constitutional."

The deepest cut into legislative competence has been made by direct government. Not content with filling constitutions with statutory material, the people in a number of states decided to revert to first principles and do their own legislating. The rise and spread of the ideas embodied in the initiative, referendum, and recall may be traced to the same spirit of distrust and discontent which promoted constitutional restrictions on state legislatures. The machinery of the state was being used for private and corporate gain. Legislators were not responsive to public opinion, nor responsible to the will of their masters. The "boss," not infrequently identified with large corporate interests, manipulated the wires behind the scenes, while the puppets on the stage danced with animation and in perfect rhythm. The very idea of representation fell under suspicion. There was a reversion in thought to ancient democracies where the people met in primary assembly and transacted public business, receiving and sending am-

bassadors, electing and cashiering generals, raising money and paying public debts. The democracy of the New England town-meeting was revived in public discussion, with the result that constitutions were amended, making a place for the legislative function of the sovereign people. The seventh amendment to the constitution of the State of Washington, adopted November, 1912, is typical: "The legislative authority of the State of Washington shall be vested in the Legislature, consisting of a Senate and House of Representatives, which shall be called the Legislature of the State of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the Legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section or part of any bill, act or law passed by the Legislature." Thus has popular sovereignty, for years embalmed in American political theory, come to life and made itself felt in the field of lawmaking.

The recall is not new in America, as Professor Munro very clearly points out.[22] The Articles of Confederation reserved to each state the power to recall its delegates at any time and to send others to replace them. Similarly the constitution of Massachusetts of 1780 provided that delegates to the Congress at Philadelphia might be recalled and others sent in their stead. So this modern movement to render officials more responsive to public opinion by means of the recall only harks back to the early days when the Fathers were suspicious of government, considered it a sort of necessary evil, and wished to allow public servants as little discretion as was consistent with their public duties. The referendum, too, is not of recent date. For years it has been the practice to submit constitutional amendments to a direct vote of the people. Complete revisions of constitutions by means of conventions are laid before the people for ratification. It is the referendum on statutes that is new. This is presupposed in the initiative. When the people by petition put a measure on the ballot to be voted on at the ensuing election, they virtually "refer" it to the electorate; so that what is called the "direct initiative" implies a referendum to the people. An independent referendum, on the other hand, may be demanded on any act, bill, or law passed by the legislature. It requires from five to ten per cent of the legal voters to invoke the referendum. As has been indicated, there are two varieties of the initiative. By the "direct initiative" is meant a direct reference of a proposal to the people at an election. The percentage necessary to

[22] *The Government of the United States* (1919), p. 518.

make operative the initiative varies, ranging from five to ten per cent. By "indirect initiative" is meant the reference to the legislature by petition of a proposal which the people wish to have the legislature consider, and which for one reason or another has not come before it. In case such an initiative measure is enacted by the legislature, it may be referred to the people by petition or the legislature itself may refer it to them. In case it is rejected by the legislature before the end of the session, the Secretary of State may submit it to the people for approval or rejection at the next ensuing regular general election. The above rules of procedure are substantially those of the constitution of the State of Washington, where are to be found provisions for both the direct and the indirect initiative.

Nearly one-half of the states of the union have experimented with the devices of direct government, and the result has been somewhat disappointing to their ardent champions and slightly disillusioning to their enemies. They have not ushered in the millennium; neither have they destroyed representative government, nor abolished private property. They have not even emasculated the party system. Political institutions are not the growth of a day; they are rooted in the soil of the land and draw their nourishment from cool depths. Representation is a hardy plant in America. Political parties have been long in the making, and it is not very easy to uproot the customs of a century and a half. The initiative, referendum, and recall are beginning to find their place in the American scheme of things. It is not the supreme place that their enthusiastic friends were sure they would find; but it is a more significant place than their enemies predicted for them. As a club behind the door, they are not without value. Legislators know what can be done in an emergency, and having this knowledge they will allow no emergency to arise. The threat of a "direct initiative" or of a referendum is often sufficient to insure legislative action, whereas in former days nothing could move some legislatures but an order from the "boss." The educational effect of submitting projects of law to the people, if they are not too technical, is not insignificant. The press, feeling a responsibility for the general knowledge of the people, takes up the measures that will appear on the ballot and explains them, often coupling their explanations with advice on how to vote. In time the electorate becomes accustomed to such editorial admonitions and votes as it thinks best. Direct democracy in ancient times was an excellent school of politics, and a revival of government by the people has stirred the currents of public thought; it has turned the attention of the electorate toward public questions,

and challenged their intelligence and patriotism in their settlement. The people have made mistakes; the leaders have expected too much of the electorate; and now that the novelty of it all has worn off, a period of reaction and scepticism has set in. Just as the long ballot burdens the electorate with many names of candidates for insignificant offices, so the "blanket" ballot of the initiative and referendum confuses the electorate with too many legislative proposals, most of them far too technical for popular understanding. The first step in a fair appraisal of the devices of direct government is a frank admission of their limitations. They are no cure-all of bad legislation; they may even add to it. They cannot escape the drive of propaganda; they may even be victims of it. Only very important questions of public policy, which can be readily understood by the average voter, should be submitted to the people for direct vote. Involved and technical questions have no place on the ballot; they should be threshed out in legislative halls, with the aid of experts. Questions concerning the health, safety, and morals of the people, the public convenience and welfare, if presented simply, can be passed upon by the electorate with a fair degree of intelligence. Moreover, political understanding may be expected to increase with the demand for it, and with the larger and more significant place in the life of the commonwealth occupied by institutions of higher learning. To admit that the electorate is hopelessly incapable of passing upon questions of broad public policy, is to decry all the agencies of public information—the press, the forum, the pulpit, the radio—and to belittle the splendid work of public education carried on by schools and colleges and universities.

III. Municipal Lawmaking Bodies

The original political unit was the city. The *Politics* of Aristotle, with its wide ramifications concerning the nature and origin of the state, the functions and ends of government, contemplates a small, compact unit known as the "city-state." The remarkable florescence of direct democracy for which the Greeks are justly celebrated, had its roots in small political jurisdictions. The Italian republics of the Middle Ages were built around cities as *nuclei*. The rise of the free communes of France brought into vogue the principle of local autonomy—the right of the people of a community to regulate their own immediate, internal affairs. But with the emergence of the all-inclusive and all-absorbing national state, the city was overshadowed and left to work out its own political salvation as best it might. How

perilously near it came to the brink of political perdition, at least in America, is known to all students of government. For years it was left to stew in its own unsavory juices; but at length some men of vision saw in the city, as manifest in its remarkable growth and vitality, a laboratory of political forces and a promise of something better. The light of scholarly investigation was turned upon the city; its form and processes were studied; and as a result certain principles of city government were evolved and certain standards of administration were set up. In the United States the pioneer in the splendid work of recovering the lost city was William Bennett Munro, whose researches in municipal government, both at home and abroad, have done much to enlighten the people of the country as to the significance of the city and its possibilities for local self-government.

There is no blinking the fact that the American system of government, with its separation of powers, coupled with checks and balances, the joy and pride of John Adams, has proved unworkable in cities. Its successful working is predicated upon some sort of responsible party control. When one of the major parties has captured the executive and has a comfortable majority in Congress, the wheels of legislation revolve rapidly and noiselessly; there is little friction and no grinding of gears. But when one party controls the executive and another controls Congress or even one house, there is bound to be friction, the heating of parts, and stoppage of the legislative machinery. Now in cities it is impossible to carry down effectively the responsible party control found in national politics. There is no sense in choosing between a Republican and a Democratic dog-catcher. The rounding up of dogs has nothing in common with protective tariff or state rights; it is simply a piece of administrative routine which must be carried out for the protection of the health and safety of the citizens. This homely illustration will serve for all the functions of municipal government; they are essentially administrative. Some questions of public policy come before the lawmakers of the city, who, acting by delegated authority from the state, proceed to pass upon them; but the essential duties of those who govern our cities are comparable with the work of managing a large business corporation. National political parties have no more place there than they have in the management of a million-dollar corporation. Local issues spring up, and local lines are drawn—but only for the purpose of gaining control of the municipal administration, to the end that new administrative policies may be tried out. Of course, it should not be forgotten that cities are public corporations and are regulated by public law. They come into close

contact with the individual citizen and have in their keeping the immediate protection of his rights of life, liberty, and property. They are political subdivisions; they are not private business corporations. The truth is that they have a sort of dual legal personality: they are subjects of private law and at the same time of public law. Cities, quite like private corporations, may be sued; and yet through their police they have extensive regulatory control over the private conduct of citizens. Like Mohammed's coffin which remained suspended halfway between heaven and earth, cities, in contemplation of law, fit in between the higher levels of the sovereign state and the lower levels of the business corporation.

It would be neither accurate nor just to lay the whole blame for corrupt city politics at the door of a principle of government, namely, separation of powers, for other elements have entered in to complicate the problem. The rich natural resources of virgin America and the drift of American life toward the cities have combined to make the privileges and franchises which city councils have had in their keeping as valuable as claims staked out in a gold field or as pools of oil at the base of a hill. In growing cities the right to lay water-mains in the streets, to construct tracks and operate street-cars, to furnish light and power, were soon estimated at their true value and fought for by every conceivable means, fair and foul. City councils were only human. Sometimes in ignorance they gave away for a mere pittance rights which soon grew into the value of a king's ransom; at other times they sold for a price what they had no right to sell. City politics became the shame of America. Foreign observers commented upon it, and reformers preached about it; but it was left for a cataclysm to jar public opinion into experimenting with new forms. Before the Galveston Flood of 1900 the approved form of city government was the mayor-council type. It was based upon a rigid separation of powers, the mayor representing the executive function, and the council the legislative. Moreover, the federal principle of checks and balances was duly incorporated and made effective. The mayor had his veto on the council, and just as in Congress an executive veto could be overridden by a two-thirds vote. Cities attempted to be miniature reproductions of the federal government at Washington. It proved to be a system of divided responsibility, in which the blame for bad government was easily shifted. Furthermore, not content with separating and balancing executive and legislative powers, the people proceeded to make elective nearly all important city officials, such as treasurer, auditor, and corporation counsel, on the theory that these

officials would serve as a salutary check on both branches of the government. It was assumed that the corporation counsel, for example, instead of confining himself to giving legal advice, would have a voice in the determination of public policies; that he would not only tell the council what the law was concerning the proposed purchase of a street railway, but would also give them a piece of his mind about what they should do. It was assumed that the treasurer would not only safeguard the public funds, but would also advise the council on policies of public finance. So the city would be a small democracy, every official and every body of officials having something to say, and all talking at once.

It took the Galveston Flood to bring home to the people of the country the hopelessness of such a cumbersome system. Never very effective, the mayor-council type of city government utterly failed to rise to the emergency created in Galveston by a huge tidal wave which swept away bridges connecting the mainland with the island-city, uprooted trees, wrecked dwellings, schoolhouses, churches and fire-stations, and completely destroyed the waterworks and lighting plant.[23] The highest level reached by the city government in its endeavor to meet the situation was to pass resolutions. The Governor of Texas was appealed to, but he would not allow the state to advance money to a city which was normally in debt and issuing bonds to make up the deficit. At length a committee of business men, already in existence for the purpose of improving the harbor, took the matter up and appointed a sub-committee to study other charters and arrive at some solution of the problem. The law governing the city of Washington, D. C., was studied, along with a model charter of Baltimore and the act of Memphis creating the Taxing Commission after an epidemic of yellow fever in 1878. Having these examples before them, and drawing heavily upon their business experience, the sub-committee framed a charter which the larger committee submitted to the legislature for adoption. The legislature granted the charter in 1901, and the new form of government was launched in the same year. It is interesting to note that the sub-committee drew upon the experience of the city of Washington, D. C., but not upon the federal government in that city. In fact, the Galveston Flood submerged the idea of separation of powers, with checks and balances, as applied to the big business of municipal corporations.

The Galveston plan rests upon the fundamental principle of the

[23] See Ernest S. Bradford, *Commission Government in American Cities* (1911), 3–10.

fusion of political powers. It scrapped once for all the mayor-council type, with its dual responsibility and deadlocks. With a bold stroke, born of dire need, it concentrated power in the hands of a Board of Commissioners charged with making and enforcing such rules and regulations for the organization and management of the city as they might see fit. The old type committed to one organ of government the *making* of rules and to another the *enforcing* of rules, leaving to these two organs the problem of working in harmony in the absence of party control. But the new type combines legislation and execution in one body of men, just as varied functions are combined in a board of directors of a business corporation. To take an illustration from public law, the commission form of government approximates in its fusion of powers and unified responsibility the cabinet-parliamentary form indigenous in England and copied on the Continent. It is a curious thing that a flood was required to awaken the people of this country to the possibilities latent in the cabinet-parliamentary type of government when applied to municipal affairs; but such was the case. The Board of Commissioners of Galveston governed the city, appointed and removed city officials, fixed the salaries and determined the qualifications of officials and employees, and granted franchises. One of the five took the title of Mayor-President and presided at meetings, but he had no veto. Of the other four, one had charge of the police and fire departments; another was commissioner of streets and public property; a third was commissioner of waterworks and sewerage; and the fourth was commissioner of finance and revenue. Five business men managed the town, and managed it well. One shudders to think what John Adams would have said, had he been permitted to return to earth and witness a board of five commissioners governing a city. It would have appeared to him as a government of men and not of laws, for where was the separation of powers so highly prized by him? or the checks and balances, so necessary to the restraint of selfish and designing men? The simple answer is that they were omitted from the plan. To the people belonged ultimate control through the ballot. All five commissioners were elected at large, not by wards. With so few in charge of the city's business every citizen knew where to go if he had a complaint to make. On second thought one is inclined to believe John Adams would have approved the Galveston plan, because he was familiar with the government of the New England town-meeting, which was direct democracy functioning through a commission elected annually and composed of so-called "selectmen." True, the real decisions in New England towns were

supposed to be made by the people themselves in their annual meetings, but it is entirely conceivable that in some instances the selectmen managed the town in a manner not unlike that in which the five commissioners managed Galveston. In some Massachusetts towns the selectmen were empowered by charter to appoint a town-manager with duties similar to those of a city-manager.[24] At any rate, the town-meeting type does not provide for a separation of powers, coupled with checks and balances.

It is unnecessary to trace at length the ramifications and modifications of the Galveston idea. Other cities have adopted the general plan and worked it out according to their peculiar needs. Some of them retain old names, "mayor" and "council," but the substance has the mark of Galveston on it. New devices in form of the recall, initiative, and non-partisan ballot have been added; but the fundamental conception of fused powers, with a definite focusing or responsibility in the hands of a few, remains unchanged. Even the luxuriant florescence of managerial schemes cannot camouflage successfully the old Galveston idea. They represent a new specialization of functions, but not a return to the checks and balances and the separation of powers. They represent an advance in the direction of expert administration. Commission government had proved weak at just this point. Commissioners elected by the people—solid business men, but without special training in the science of municipal government—would naturally make mistakes. In time it began to appear that municipal administration was an art based upon scientific principles and that for successful operation it required a permanent and expert personnel. It was this conviction which gave rise to the city-manager plan, first used in Dayton, Ohio. Professor William Bennett Munro, to whom, as has been said, the country is indebted for a new sense of the significance of cities in our national life, and for his scholarly research in the forms and functions of municipal government, says: "The city-manager plan was devised to remedy these two chief defects in the commission form of government, namely, the lack of concentration in administrative responsibility and the tendency to put the various departments in direct charge of men who have no expert qualifications."[25] Under this plan the commission relinquishes a share of its powers to the city-manager. The commission confines itself to enacting ordinances and to an indirect control of the city administra-

[24] This information was gleaned from a valuable paper on town government in Massachusetts, prepared by Professor John F. Sly of Harvard University.

[25] *The Government of American Cities* (1924), p. 388.

tion through the manager. It is no longer the body of unlimited competence that the Galveston commission was. Thus there has come about a specialization of functions. The manager represents the principle of permanent expert administration, free from hand-shaking and speech-making. Upon him devolves the duty and responsibility of coördinating municipal functions, increasing efficiency of service, and decreasing the cost of government. He is appointed by the commission or council on contract and is removable at any time. The Dayton charter makes him subject to recall by the voters, which seems a departure from the principles of good administration. The manager appoints and removes heads of city departments, and is responsible for the actual management of the corporation's affairs; the council or commission is responsible for the formulation of policies. Thus the competence of the original commission has been delimited in the interests of expertness, the manager taking what the commission lost. The city-manager plan can be varied almost indefinitely, the amount of authority vested in the manager being augmented or diminished by creating independent boards, responsible to the council. But the general outlines remain clear. Power delegated by the state is concentrated in the hands of a small body of men and women, elected at large or by wards. This body divests itself of the purely technical functions of city administration, retaining the functions of formulating general policies, scrutinizing public finances, and sharing indirectly in administration through the appointment and removal of the city-manager. There is no return to a separation of powers; there are no checks and balances, in the old sense of these terms. There is a delimitation of competence; a specialization of the function of expert administration; and a new relationship between the formulation and the execution of policies. In brief, right there is the valuable contribution of the city-manager plan. It draws a sharp line between the functions of policy-forming and of administration. To a commission or council it commits the one; and to an expert administrator it commits the other. On January 1, 1926, a total of 357 cities in the United States, in Canada, and in New Zealand had adopted the city-manager plan of government. Of course, the charge of autocracy is heard from old-fashioned politicians. Insistence that democracy means the separation of powers, checks and balances, together with the election by the people of all officials from the mayor to the dog-catcher, is to be expected from those whose ideas of democracy have undergone no expansion with the development of modern life. But new democracy means something else: it means a recognition of the place of expertness in

public affairs, and a form of government which will provide for the expert administration, by trained public servants, of the ordinances framed by a small and compact group of men and women, chosen for their knowledge of public business and their disinterested regard for the public good.

READING NOTES

There is an abundance of material on the organization of the legislative department of government and the process of lawmaking, but much of it is scattered through general works on American government. Texts on the introduction to political science and on the principles of politics usually contain a chapter or more devoted to the legislative process.

The National Legislature

There is no better way to begin the study of the structure and powers of Congress than by reading carefully what Hamilton, Madison, and Jay wrote in the *Federalist*. One finds reviewed there the general form of government marked out in the Constitution and the general mass of powers allotted to it, as well as an examination of the particular structure of the government and the distribution of powers among its constituent parts. For an intimate account of the impression made by Congress upon a distinguished Frenchman, the student should read *Democracy in America*, by Alexis de Tocqueville (2 vols. 1835–1840), especially Vol. I, Chapter XIII. An Englishman of rare insight and judgment, James Bryce, described our national legislature as others see it, in *The American Commonwealth* (2 vols. 1919–1920, new edition), especially Vol. I, Chapters X–XXI. With the English parliamentary system as background, Woodrow Wilson presented a critical analysis of the American presidential system, in *Congressional Government* (15th edit. 1900). See also *Constitutional Government in the United States* (1908), by the same author. Suggestions on the transformation of congressional into parliamentary government are made in William MacDonald's *A New Constitution for a New America* (1921). Standard texts on American government treat adequately the National Legislature. See William Bennett Munro, *The Government of the United States* (1919), Charles A. Beard, *American Government and Politics* (Fourth Edition, 1924), Ogg and Ray, *Introduction to American Government* (1922), and Everett Kimball, *The National Government of the United States* (1919). A convenient summary of the facts pertaining to the organization and powers of Congress will be found in *The Law of the Constitution* (1922), by Charles K. Burdick. On legislative procedure consult *History and Procedure of the House of Representatives* (1916), by D. S. Alexander, and *Legislative Procedure* (1922), by Robert Luce. Special studies of merit, among others, are *The Election of Senators*

(1906), by George H. Haynes, *The Origin and Development of the United States Senate* (1895), by Clara H. Kerr, *The Speaker of the House of Representatives* (1902), by Mary P. Follett, *The American Senate* (1926), by Lindsay Rogers, and *Congress* (1926), by Robert Luce. A brilliant treatment of the science of legislation is to be found in Ernst Freund's *Standards of American Legislation* (2d edit. 1926).

State Legislatures

A veritable mine of information on state legislatures is to be found in the bulletins prepared in anticipation of the meeting of the Massachusetts Constitutional Convention of 1917–18, and the Illinois Constitutional Convention of 1920, and intended to serve as an aid to constitution-making. Some of the ablest political scientists in America collaborated in the preparation of these bulletins. Records of the New York Constitutional Convention of 1915, and of similar bodies in other states, add to the material available for the study of state legislatures. In this connection special mention should be made of the excellent service performed by the state legislative reference bureaus. A good general description of legislatures, state and federal, although not recent, is *American Legislatures and Legislative Procedure* (1907), by Paul S. Reinsch. See also *Readings on American State Government* (1911), by the same author. For a comprehensive treatment of the framework and operation of legislative bodies, see *Legislative Assemblies* (1924), by Robert Luce. A convenient collection of state constitutions in one volume (1918) is the work of Dr. Charles Kettleborough. Widespread distrust of state legislatures and vigorous protests against them, voiced in the demand for the initiative and referendum, have aroused a new interest in state government, resulting in a number of books which the student of the legislative process should not neglect. Professor Arthur N. Holcombe led the way in 1916 with a solid volume on *State Government in the United States* (revised and enlarged with the collaboration of Roger H. Wells in 1926). See especially Chapters IX and XV (revised edition). Professor Walter F. Dodd followed in 1923 with a volume in the Century Political Science Series entitled *State Government.* An illuminating chapter on the initiative, referendum and recall (Chap. XIX) gives the clue to the revived interest in state legislatures. Professor John M. Mathews gave proof of a sustained interest in the subject by publishing *American State Government* (1925). Chapters VI and VII describe the organization, powers and procedure of the legislature, and Chapter V deals with popular government. The literature on the subject of direct legislation by the people is so extensive and well known as to need little, if any, comment. Consult the *Initiative, Referendum and Recall in America* (1911), by E. P. Oberholtzer, *The Initiative, Referendum and Recall* (1912), edited by William Bennett Munro, *State-Wide Initiative, Referendum and Recall* (1912), edited by Beard and Schultz, and *The Operation of the Initiative, Referendum and Recall in Oregon* (1915), by J. D. Barnett.

Municipal Lawmaking Bodies

The results of years of painstaking investigation and careful analysis in the field of municipal problems are admirably summed up by Professor William B. Munro in his *Municipal Government and Administration* (2 vols. 1923–26). See also *The Government of American Cities* (fourth edition, 1926), by the same author, which contains much new material. A stout volume on *American City Government* (1924) by William Anderson emphasizes principles and processes in contradistinction to facts and structure. See especially Chapters XIII–XV. Covering the same ground as earlier texts, with a slightly different emphasis, Thomas H. Reed has added another work to the literature of the subject, *Municipal Government in the United States* (1926). Recent tendencies are toward assembling selections from a wide range of material bearing on municipal affairs, and making application of principles to concrete cases. Joseph Wright has given us a useful book of supplementary reading in the field of city government in his *Selected Readings in Municipal Problems* (1925), with an introduction by Professor W. B. Munro. A collection of original documents, pertaining to municipal government, including extracts from constitutions, statutes and charters, has been assembled and published by Thomas H. Reed and Paul Webbink (1926). A. Chester Hanford has experimented successfully with the case method as applied to local government in his *Problems in Municipal Government* (1926). Students of the subject are indebted also to President F. J. Goodnow, and Professors John A. Fairlie, Leo S. Rowe, Howard J. McBain, Albert Shaw, C. R. Woodruff, Henry Bruère, Chester C. Maxey and others for valuable contributions to the science of municipal government and administration. A treatise, that is not recent but one that is still useful from the standpoint of orientation, is *Commission Government in American Cities,* by Ernest Bradford (1911).

CHAPTER VIII

THE AMERICAN JUDICIAL SYSTEM

I. The Federal Judiciary

The Formation of the Judicial Department under the Constitution.—The Articles of Confederation made practically no contribution to the court system of the United States, although a system of colonial courts had established a precedent for the courts of the states. In fact, all that was necessary for the states was a transition of the system from one sovereign régime to another. The Founding Fathers had the opportunity to till new soil in the field of law as well as in the field of administration. The several plans for the organization of a government included specific recommendations for a system of courts. The Virginia Plan suggested a national judiciary to consist of one or more supreme tribunals, and of various inferior tribunals to be constituted by the national legislature. The judges were to hold their offices during good behavior and to receive a fixed compensation for their services. The inferior courts were to hear and determine initially, and the supreme tribunal finally, cases involving piracies and felonies on the high seas, captures from an enemy, cases in which foreigners or citizens of other states applying to such jurisdictions might be interested or which respected the collection of the national revenue, impeachments of all national officers, and questions which might involve the national peace and order. The New Jersey Plan recommended a federal judiciary to consist of a supreme tribunal, the judges of which were to be appointed by the executive, and were likewise to hold office during good behavior and receive a fixed compensation. The original jurisdiction of the judiciary was to extend to all impeachments of federal officers, and its appellate and final jurisdiction to all cases touching the rights of ambassadors, captures from an enemy, piracies and felonies on the high seas, and all cases in which foreigners might be interested, the construction of any treaty or treaties, or cases which might arise on any of the acts for the regulation of trade or for the collection of the federal revenue. It was further urged that no member of the judiciary should, during his tenure of office, or for a certain number of years after his retirement,

be eligible to another appointment. The Hamilton Plan suggested that the supreme judicial authority of the United States should be vested in a certain number of judges to hold office during good behavior, with adequate and permanent salaries. Its jurisdiction should be original in all cases of capture, and appellate in all cases which concerned the revenues of the general government or the citizens of foreign nations. The legislature of the United States should be authorized to establish courts in each state in order to determine all matters of general concern. From these three proposals, the personnel, tenure, and jurisdiction of the federal courts were determined.

The need for a national system of courts was urgent. No judiciary existed under the Articles of Confederation to require states and citizens to obey the laws of the country. The nationalist group of the Federal Convention wanted a definite provision in the Constitution for a Supreme Court and the necessary inferior courts. The advocates of the small states feared national control of the judiciary and a system of courts independent of the legislature. After considerable discussion it was agreed that judicial power should be vested in one Supreme Court and in such inferior courts as the Congress might from time to time ordain and establish. The efficacy of the system of courts adopted by the Federal Convention was asserted by John Marshall in his remarks before the Virginia ratifying convention. He declared it to be a great improvement upon the system from which the country was then departing. "Here," he said, "are tribunals appointed for the decision of controversies which were before either not at all, or improperly, provided for. That many benefits will result from this to the members of the collective societies, everyone confesses. Unless its organization be defective and so constructed as to injure instead of accommodating the convenience of the people, it merits our approbation. After such a candid and fair discussion by those gentlemen who support it, after the very able manner in which they have investigated and examined it—I conceived it would no longer be considered as so very defective, and that those who opposed it would be convinced of the impropriety of some of their oppositions." Some of the men of the Virginia convention contended that the federal courts would not determine cases which came before them with the fairness and the impartiality of other courts. Marshall pointed out that the independence of judges in office and their manner of appointment determined popular confidence in them. He also declared that the federal judges would be chosen with as much wisdom as were the judges of the state courts, and that they would

be equally if not more independent. Mr. Mason, in the same convention, objected to the power of Congress to create additional and inferior courts as the public convenience might require. Marshall refused to concede that the power of increasing the number of courts could be objected to, as it would remove the inconvenience of being dragged to the center of the United States. He said: "I own that the power of creating a number of courts is, in my estimation, so far from being a defect that it seems necessary to the perfection of the system." In answer to the charge that the federal jurisdiction would annihilate the state courts, Marshall pointed out that the state courts would not lose the jurisdiction of the cases they then could decide, but would have a concurrence of jurisdiction with the federal courts in cases in which the latter had cognizance.

An interesting provision in the Virginia Plan was a so-called "council of revision." The executive and a convenient number of the national judiciary were to constitute this council, with authority to examine every act of the national legislature before it should operate, and every act of a particular legislature before a negative thereon should be final. The dissent of such a council would amount to a rejection, unless the act of the national legislature were passed again or the act of the state legislature were negatived by a certain number of members of each branch. This was virtually an investment of the power of veto in a consolidated executive and judicial council. The plan was rejected.

The question as to the term of office of the members of the judiciary aroused little controversy. The three major plans of the convention agreed upon the life term, or "during good behavior," as the appropriate one, and this was favored by a majority of the Constitutional Convention.

The method of electing the judges was discussed at length. The Virginia Plan suggested election by the legislature, whereas the New Jersey and Hamilton Plans suggested appointment by the executive. James Wilson opposed legislative election because of intrigue which might develop, and suggested appointment by the President. James Madison thought appointment should be vested in the Senate, whereas Benjamin Franklin favored selection by the legal profession. On July 13, 1787, it was unanimously agreed to vest the power of judicial appointment in the Senate. On July 16 an attempt was made to reconsider, and on July 18 it was finally decided that the President should appoint the judges by and with the advice and consent of the Senate.

The Judicial Power of the United States.—The Constitution defines the nature and extent of the national judicial authority as follows:

> The judicial power of the United States shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors or other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of the same state claiming lands under grants of different states; and between a state, or the citizens thereof, and foreign states, citizens, or subjects.

The Judicial power of the United States is thus extended to certain matters, to all cases in law and equity arising under the Constitution, the statutes and treaties of the United States, and to all admiralty and maritime cases. Thus the entire range of constitutional, statutory, and conventional law is comprehended, and cases arising under them may be heard in the federal courts. Any person who asserts a right under the Constitution, a law, or a treaty to which the United States is a party, may have a hearing. This is a sweeping provision, and applies to all persons who are substantially aggrieved. Moreover, the positive legislation of the United States is given definite legal effect. All one has to do to secure a federal hearing is to assert a right under one of the positive enactments in the form prescribed by law. The fact is to be noted that the cases may be in law or in equity. The term law signifies the rules which have developed from the English common law or the customary law; here it refers also to the enactments of the legislature. Equity designates the system of rules which has grown out of the court of chancery and which was designed to supply the defects of the rigid common law. Forms of action developed at the common law covering the usual classes of offenses, but new wrongs developed for which there was no remedy at the common law and for which no form of action was provided. The remedies of equity were designed, not to supplant, but to supplement the remedies at the common law. In the United States the ordinary law courts are courts of equity as well.

The judicial power of the United States extends to all cases of admiralty and of maritime jurisdiction. The federal courts are, therefore, invested with authority over all American vessels both on the high seas and within the navigable waters of the United States. A

definite system of rules and procedure has developed in admiralty cases, called admiralty law. In a very real sense it is international law from a practical point of view. All controversies in regard to charter parties, salvage, collisions, hours and wages of seamen, marine insurance, and such rights and liabilities as belong to the interested parties, are included under this heading. Congress is authorized to define and punish piracies and felonies committed on the high seas and offenses against the law of nations, to declare war, to grant letters of marque and reprisal, and to make rules concerning captures on land and water. Under this authority the federal courts are constituted prize courts during a war to which the United States is a party. Moreover, the federal courts are charged with the interpretation and enforcement of such maritime laws as are enacted by Congress, and such maritime jurisprudence as may be exercised due to international practice.

The American judicial power is expressly extended to cases involving foreign representatives. Ambassadors, as well as other public ministers and consuls, are specified. Under international law public ministers of the diplomatic classes accredited to the United States are entitled to exemption from local criminal and civil processes on account of their diplomatic character, and are entitled to certain ambassadorial privileges. Since the states had no international existence, and since the President was to be the single spokesman of the country in international relations, it was deemed wise to vest jurisdiction over cases affecting foreign representatives in the federal courts. In this manner the local state jurisdictions are prevented from interfering with the direct federal enforcement of international law. The rights and privileges of ambassadors, and the measures taken by the Government of the United States to protect them, are set forth fully in the third part of this volume.

The judicial power of the United States extends also to controversies to which the United States is a party, to controversies between two or more states, between a state and citizens of another state, between citizens of different states, and between a state and the citizens thereof, and foreign states, citizens or subjects. Where the United States is a party to the suit, or where the litigation is between two states of the Union, there is little question as to jurisdiction. Difficulties soon arose as to controversies between a state and citizens of another state. This situation was remedied by the Eleventh Amendment, after the decision by John Marshall in the case of *Chisholm vs. Georgia* (2 Dallas 419). The circumstances of this decision and the

amendment which followed have already been recounted. The net result of the amendment was to exclude from the jurisdiction of the federal courts, not only cases between a state and citizens of another state, but also cases between a state and its own citizens. The final jurisdiction of the federal courts under this provision includes controversies between citizens of different states of the Union, and between American citizens and aliens. This seems to be the only logical arrangement, in view of the responsibility of the federal government to foreign governments for the treatment of their nationals residing or sojourning here. It also was deemed wise to reserve to the federal courts the hearing and determination of cases between citizens of the different states.

The Organization of the Federal Courts: The Supreme Court.— The Supreme Court of the United States is the head of the judicial system and the keystone of the judicial arch. It is America's highest court and is invested with the most extensive judicial power in the world. It consists of a Chief Justice of the United States and eight Associate Justices. In order that a trial may be held, six justices must be in attendance; and a majority of the court must concur in order to reach a decision. The sessions of the Supreme Court extend from October until May. Its original jurisdiction extends to cases affecting consuls, ambassadors, and other public ministers, and in cases in which a state may be a party; in all other cases its jurisdiction is appellate, both as to law and as to fact, except as altered by Congress. Most of the work of the Supreme Court has to do with questions involving points of constitutional law which are brought up from the lower federal courts or from the state courts. A suit may be removed from the state courts or the lower federal courts because its subject-matter is within the jurisdiction of the Supreme Court itself. The most abundant source of litigation before the Supreme Court is through appeal from the state courts or from the lower federal courts. This is accomplished through a writ of error, under which an inferior court is ordered to transmit its record to a superior court where the trial may proceed. Only such controversies as involve the Federal Constitution, the laws of Congress, or treaties of the United States, may be appealed to the Supreme Court. Thus the work of the Supreme Court is reserved for the more important business of maintaining the Constitution and giving effect to the principle of constitutional limitations. The procedure in the Supreme Court is in large measure determined by the court itself. Interest in its decisions is due to the fact that they involve great questions of constitutional law or im-

portant cases to which the government is a party. After a case has been presented to the Supreme Court through the arguments of the attorneys for the parties, each justice has the obligation to examine for himself the facts of the case, and the arguments which have been advanced, and to discover the law to be applied. The court in conference discusses the individual views of the judges, who come at length to some agreement. One member of the court is designated by the Chief Justice to prepare the court's opinion, which is supposed to embrace the reasoning of the majority of the judges with respect to the case. The opinion is final; it is submitted in preliminary form to the judges in conference and is finally agreed upon as the decision of the court. As such, it is read in open court and is ultimately placed on record. A minority of justices, finding themselves unable to agree with the decision of the majority, may, and often do, write dissenting opinions. Each dissenting justice may prepare his own dissent, or a group of them may dissent collectively through a single opinion. It has been suggested that the practice of publishing dissenting opinions at courts gives the appearance of division, whereas the publication of the majority opinion, as the only one, would have the effect of placing the court as a whole squarely behind the decisions it reaches. One justice, or more than one, may concur with the majority opinion but may arrive at the same view by a different chain of reasoning or through a consideration of other factors in the law. An opinion which takes this form is called a concurring opinion. The great opinions declaratory of constitutional law are in the main prepared by the Chief Justice himself. This was especially true during John Marshall's incumbency. In his thirty-four years of service on the bench, he dissented only eight times and gave only one dissenting opinion on a constitutional question. Of the 1106 opinions delivered by the court during his service, the Chief Justice wrote 599. Repeated instances of constitutional decisions prepared by the Chief Justice could be cited.

The great repository of American constitutional law is the *United States Reports*. This series constitutes the reported decisions and the opinions of the Supreme Court from the beginning of its history to the present time. Anyone who is interested in the decisions of the court, either historically or from the standpoint of modern constitutional controversies, must make frequent reference to these documents.

The Circuit Court of Appeals.—Next in rank to the Supreme Court in the judicial hierarchy is the Circuit Court of Appeals. The country

is divided into nine circuits or judicial districts. The number of judges assigned to each circuit varies according to the business of that district. The minimum number so assigned is three. Each of the Supreme Court justices is associated with the justices of one of the districts. The function of the Circuit Court of Appeals is to review, either by appeal or on writ of error, the decisions of the District Courts of the United States. Cases appealed from the latter go directly to the Circuit Court of Appeals, unless the controversies involve special subjects such as points of constitutional law, prize cases, or jurisdiction of the lower courts. Such cases go directly on appeal to the Supreme Court of the United States. The Circuit Court of Appeals may decide finally with respect to a large variety of subjects, such as cases involving criminal laws of the United States, the patent and revenue laws, and controversies between aliens and citizens, and between citizens of different states.

The District Courts.—The lowest federal court is the District Court of the United States. There are about ninety districts, with from one to six judges assigned to each district. Here also the pressure of court business determines the number of judges. The larger districts with the larger number of judges are separated into divisions, and each district judge presides over a division within his district. The District Court, being the initial federal tribunal and the basic judicial institution, has an extensive jurisdiction. A jury is used in this court, but not in the two higher federal courts. This court acts in cases arising under a number of federal statutes, such as the bankruptcy laws, copyright, post-office, internal revenue statutes, and in cases having to do with admiralty and the immigration of aliens. Much of its business is concerned with cases involving restraint of trade.

Special Tribunals.—Special tribunals have been established as occasion has demanded in order to deal with cases not belonging properly to the ordinary courts. The outstanding example of the special tribunal is the Court of Claims, the business of which is to hear and determine claims against the Government of the United States. It may decide, first, whether or not a just claim exists; and second, the amount of reparation due. The award of the court depends entirely upon congressional appropriation and its execution. The court has had the advantage of reducing to legal form all applications for redress against the Government of the United States. It is composed of a Chief Justice and four associate justices. In 1909 there was established a Court of Customs Appeals, organized much in the same manner as the Court of Claims. It is empowered to hear appeals from the deci-

sions of the Board of General Appraisers with respect to the administration of our tariff laws. Certain territorial courts established by the United States in the District of Columbia, Porto Rico, Hawaii, Alaska, and the Philippine Islands are in fact federal courts. The common law as modified by federal statute, and not as it prevails in the states of the Union, is enforced by these courts.

The Federal Law Officers.—One of the executive departments is the Department of Justice. It is the legal department for the American Government, and is supported by a vast array of attorneys and marshals. While entirely separate from the judiciary, it bears a close relation to the courts. The chief law officer of the United States is the Attorney-General, whose business it is to represent the Government in all legal questions. He must upon request advise the President and the heads of departments on legal matters pertaining to their official administration. He, or his representatives, must appear in the Supreme Court to prosecute cases in the name of the federal government. He has a vast appointing power, in view of the fact that he nominates to the President the attorneys and the marshals in the various judicial districts of the United States; and it is also his business to furnish solicitors for the other government departments. The general problem of law enforcement rests mainly in his hands. The vast domain of federal law consisting of the Constitution, treaties, and acts of Congress, must await action by his department. A District Attorney is assigned to each judicial district to prosecute cases in the name of the Government, as the representative of the Attorney-General. We are interested in the Department of Justice in this connection only to the extent that it is connected with the courts.

Treason.—Treason is defined by the Constitution of the United States, so that Congress cannot overstep certain limits in prescribing penalties for it. At first, treason was regarded as the murder of the sovereign, but in time it came to cover many crimes. Abuses committed in the name of punishment of treason led aggrieved people to petition for relief. The Constitution sets forth that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." It further provides that "no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." The loss of civil rights or of property rights cannot extend beyond the life of the person guilty of treason. Beyond these limitations, the power to declare the punishment for treason is vested exclusively in Congress. One of the leading trials in this country was

that of Aaron Burr, who in 1807 was charged with a misdemeanor in setting on foot in American territory a military expedition against the dominions of Spain; and with treason in assembling an armed force with the design to seize the city of New Orleans, to revolutionize the territory attached to it, and to separate the western from the eastern states. The defense urged that there was no evidence of treason, and no overt act or probable ground to believe Burr guilty. There were no soldiers anywhere, it was declared, to prove an expedition. The trial unfortunately involved the personal feelings of Jefferson, who was then President, and of Marshall who was Chief Justice. A verdict of not guilty was returned. While the record of the court should be respected, the aims of Burr were perfectly clear and would, had they not been arrested, have resulted in a dismemberment of the Union.

II. The State Courts

The Judicial System of the States.—At the top of the judicial arch in each state government is its supreme judicial tribunal. This court of last resort is designated by different titles, such as the Supreme Judicial Court, the Court of Errors, the Court of Appeals, or the Supreme Court. It is somewhat like the Supreme Court of the United States in its relation to the inferior courts. While it has limited original jurisdiction, most of the cases coming before it are appealed from the inferior courts. The number of judges varies in different states. Their terms are comparatively long. They are elected either directly by the people or by the legislature, or else appointed by the governor. In that domain of law which is purely within the competence of the state courts, and for which there is no urgent reason for appeal to the superior courts, it speaks with finality. There is always a Chief or Presiding Justice who is the head of the court, and who presides at its sessions. Just below the highest court in the state is usually found a Court of Appeals, which exercises jurisdiction over a district embracing a number of counties. These courts have a wide jurisdiction in civil and criminal cases of the more consequential class. They also enjoy an appeal from the decisions of the lower courts. Questions of law may be taken to the Supreme Court of the state, but the determinations of the Courts of Appeal as regards questions of fact are usually final. This court is called by different titles, such as District Court, Circuit Court, Superior Court, or Court of Appeals. In the third place, each state has a group of County Courts which take cognizance of all controversies not coming within the jurisdiction

of the Justice of the Peace. These courts are today survivals of the system of county courts as they existed in colonial times. In the New England colonies the county was one of the least important of local government areas. The County Court, however, did function. In New England it was composed of all the justices, and provided for prisons and houses of correction. Fines might be levied against towns, and even against officials in case of neglect of an official duty. It continued to expand its functions until it granted licenses to engage in trade or in occupations; and in this manner it began to assume legislative and administrative functions, which were finally checked. County Courts were established in the southern states. Justices in the main were appointed by the governor, and the court, serving as the country board, exercised a general control of local government. The judge of the County Court is generally elected by the people. The court has original jurisdiction in many matters involving the laws of the state. Sometimes it is called a Superior or District Court. Trial by jury is provided for in most instances. The court may hear appeals from the Justices of the Peace. While administrative functions are assigned to these courts in some of the states, the tendency is to withdraw their activities from the administrative field altogether. A large part of the work of the County Court has to do with criminal cases, and also with civil controversies which have taken place within the confines of the county. The County Court may be charged with the function of probating wills and other *ex parte* proceedings. Its jurisdiction may extend to cases of insanity, the sending of orphans and dependents to state and county institutions, and to cases of juvenile delinquency. There may be special county courts, apart from the ordinary ones, to which are committed special types of judicial business. This may extend to the probation of wills, the disposal of estates, commitment to public institutions, the appointment of guardians, election cases, and such other matters as may be conveniently assigned to them. At the bottom of the list of the state judiciary we find the Justices of the Peace. There is usually one for each township, which is a subdivision of a county for judicial purposes and sometimes for other purposes. The Justice of the Peace began his petty legal business in England centuries ago. Today the justice court is a nation-wide judicial institution of local jurisdiction. The Justice of the Peace is elected by the people of a township for a limited term. No qualifications, such as admission to the bar, are necessary. The courts have a limited civil jurisdiction in cases amounting to about $200. As a rule they cannot deal with cases of title to land. Most of

their civil cases have to do with disputes concerning wages, collections, and petty financial controversies. They are not courts of record. There is no reason why the lowest court in the state system should not be presided over by men of legal training. Much of their business at the present time is given over to considering violations of the traffic laws of the county and state. After a civil dispute has been settled, it may be appealed to the County Court unless the sum involved is very small. The justices have a criminal jurisdiction where the penalty does not extend beyond a small fine or a brief confinement in the local jail. The defendant may demand a trial by jury. Warrants issued for arrest by the justices form a large part of their business. If this court finds the case too serious for settlement, it may bind the prisoner over to the Grand Jury, and the County Court may then proceed with the business of prosecution. The Justices of the Peace are not only judicial officers, but have many other minor functions. They administer oaths, take acknowledgments, and perform marriage ceremonies, for which services they receive a fee.

The Law Officers of the State.—At the head of the Department of Justice of the state stands the Attorney-General. He is in most cases elected by the people, so that he is not under the control of the Governor to the extent that the Attorney-General of the United States is under the control of the President. It is his business to advise the Governor and the departments of the state government with respect to their legal rights, and with regard to legal questions. He appears as prosecutor for the state in important suits to which the state is a party. He may direct the county or district attorneys to proceed against persons who in his judgment have violated the laws of the state. The enforcement of state law rests largely in his hands. The fact that the Attorney-General holds an independent position through popular election gives him a special status. In cases of conflict between two institutions or offices of the government he may give his advice without feeling any particular responsibility to either department.

The most important law officer from many points of view is the public prosecutor. Called by many titles, such as County Attorney, Prosecuting Attorney, District Attorney, or State's Attorney, he is usually elected by the people of the county or judicial district in which he stands for election. He has a dual capacity, and is an officer both of local government and of the state government. His identification with the county government is likewise important. He must represent the state in the prosecution of criminals, yet he is responsible neither to the state nor to any state officer. He is elected by the

people of his district and is paid by them. To all intents and purposes, therefore, he is an officer of the county. He is the legal adviser to the county officers, such as the County Board, and to the elective officers. Such legal questions as arise in their official administration may be referred to him. The Prosecuting Attorney may, as the political enemy of another county officer, be unreliable insofar as the advice which he offers is concerned. In some states the advisory function of the public prosecutor is taken from him and assigned to a county counsel, who is in a real sense the legal adviser of the county departments. The prosecutor must often represent the county in civil cases growing out of contract or tort, the building of highways, real estate transactions to which the county is a party, the making of contracts, and other legal matters of this kind which may require his attention. The county as a body corporate, like the municipal corporation, may buy, own, sell property, may enter into contracts, may employ men for wages, and may sue and be sued. The leading business of the prosecutor is that of performing the function which his title implies; namely, pressing suits against persons who have violated the law. Here he has a large and important function, and, as a matter of fact, wide discretion. His interest is that of seeing to it that the person alleged to be guilty, is brought before the bar of justice, and, if declared guilty, punished in the name of the state. Owing to the fact that he is an elective officer, and is in no sense responsible to the Attorney-General of the state, to the Governor, or even to the people as a whole, he may be described as an officer of the state, elected by the people of the county, for the purpose of representing the state in the administration of justice. His independence may be a blessing, or it may be a curse. If he is at loggerheads with the Attorney-General of the State, that official may institute legal proceedings in the county independently of the public prosecutor. The Prosecuting Attorney as the leading law enforcing official holds a key to the peace, the security, and in many cases the good name of the county and the state. The position offers an opportunity for young men, comparatively unlearned in the law and with little experience, to make reputations for themselves. Many abuses of the position grow out of a desire to secure a notable conviction, in order that it may lead to higher political rewards. Such a motive is a base one, against which bar associations and the legal profession generally continue to protest.

The procedure in prosecuting violators of the law may be simple or complicated, according to each individual case. A criminal may be

apprehended in the act of violation and arrested immediately, or he may be charged with the crime and arrested upon warrants issued by direction of the Prosecuting Attorney or of any qualified citizen. An immediate hearing may be demanded before the local magistrate. The accused is dismissed if there is not sufficient evidence to justify his arrest, or he may be bound over to the Grand Jury and bail fixed according to the gravity of the offense. The Grand Jury is a time-honored legal institution which meets at definite periods according to the law. It is composed of from five to twenty-three members. The Prosecuting Attorney presents to the Grand Jury such evidence of crime as he may have in his possession, whereupon the Grand Jury examines it with a view to determining whether or not prosecution should ensue. After a consideration of the evidence submitted, the Grand Jury will vote either a "true bill" or indictment, which means that the accused shall go to trial, or "no bill," which means that the accused shall be discharged. The tendency of Grand Juries is to accept the recommendations of the prosecutor, who is in a better position to know the circumstances of each case. It is sometimes charged that indictment by a Grand Jury gives a color of legality to cases which a prosecuting attorney will press for expedient reasons, but which he may intend to drop if his interests dictate. To compel prosecution upon the sole responsibility of the prosecuting attorney would make that officer more careful in choosing cases which he would bring to trial. The county of Los Angeles has provided a public defender for the benefit of accused persons who are unable to finance their own defense. The state, with its elaborate machinery of justice, seemingly has the advantage in criminal cases. The prosecutor in entering upon a case has a tendency to assume guilt. The person of ordinary means may exhaust his resources in promoting his defense, while the penniless defender is in a most difficult position. While counsel may be assigned by the court for defense of the accused, few lawyers take much interest in such assignments, and the motives of those who accept them are not always above suspicion. The establishing of the office of public defender seems to remedy one of the defects in our judicial machinery which has operated clearly to the disadvantage of the accused.

An important official in each court is the Clerk of the Court, who is a necessary adjunct to the court system. Without him the judges, the enforcement officers, the defense counsel, the parties to the suit, the witnesses, and all interested parties would be at sea. He keeps a record of the proceedings of the court, prepares its docu-

ments and papers, and records its decisions and judgments. Notices are sent to all interested parties, and court papers, such as summonses for jurors and subpœnas for witnesses, are prepared by him. In some cases he keeps the vital records of the community, such as statistics relating to marriages, deaths, births; and he may issue burial certificates, birth certificates, and marriage licenses.

The leading enforcement officer in the county is the Sheriff. The origin of the office goes back to early English history. Feudalism reigned in England before the Norman Conquest in 1066. At the top of the system was the king, whose authority was much restricted by a group of feudal lords who ruled over shires. The king, determined to break down these barriers, appointed officers known as the "shire-reeves" who enforced allegiance to the crown. In time the shire-reeve became known as the sheriff. He was, in a very real sense, a personal representative of the king. He was the peace officer, carried out the regulations of the king, was an officer of the King's Court, impressed men into the King's Army, and collected taxes. As the power of the lords and earls decreased, the sheriff ceased to conduct active campaigns against them, and became an administrative officer of the crown. He no longer collected taxes or enlisted men in the military forces; he had become the leading peace officer of his administrative district, which came to be known as the county. The office was introduced into the United States along with the county as a unit of local government. The Sheriff is an officer both of the county and of the state. He has something of an independent position; he is responsible neither to the county officials nor to the state officials. As an officer of the court he is in a sense under the control of the judge. While his coöperation with the officers of the state and the county is assumed, yet it may be denied; and nothing can be done to compel his acquiescence. As an officer of the state the Sheriff must enforce the state laws and must carry out the orders of the court in the name of the people of the state. Prisoners are arrested under the authority of the state. He is the executive officer of the county jail, and in some cases resides in that institution or on its grounds. He is elected by the people of the county, and is paid by them. Where his county functions end and his state functions begin, is not always easy to determine. His chief functions are to maintain the peace of the county under the laws of the state as a peace officer, to serve the judges as an officer of the court, and to have charge of prisoners in confinement.

Judges and the People.—In recent years some of the state govern-

ments have extended the recall to judicial officers. The extension is based upon the principle that the agents of the people should face a constant popular vigilance over their administration of their offices, which might conceivably require their retirement before the expiry of their regular terms. This is a democratization of the state judiciary greater than that under a system providing for the popular election of judges alone. Much discussion has been carried on with respect to the advisability of extending the principle of appointment to judges of the state. The greater security of tenure of the federal judiciary, and its comparative freedom from political influence, is cited by supporters of the measure as something which should be introduced into the state judicial systems. It seems true that an appointed judge is less likely to be influenced in his decisions by political or personal considerations than one elected by the people. The principle of recall, however, is distinctly a step toward further popular control. Some states have applied the recall to all elective officials. A few of them have excluded judges from the operation of the law. The conservative view was expressed by President Taft, who vetoed the enabling act under which Arizona applied for admission to the Union, which had a section in the Constitution providing for the recall of judges. Taft declared in his veto message that it was the function of the courts to make valid the action of the government against the majority. He regarded the Constitution as the will of the whole people, who must be bound by it. Upon being admitted to the Union Arizona inserted the recall provision in her constitution. One of the leading advocates of the recall principle was Theodore Roosevelt, who declared that the application of the recall in any shape was purely a matter of expediency, and that each community had the right to try the experiment for itself in whatever shape it pleased. Roosevelt believed in adopting the recall only as a last resort, when it was clear that no other course would achieve the desired result. He was of the opinion that we must be cautious about recalling a judge, and equally cautious about interfering with the judge in decisions made in the ordinary course as between individuals. "When a judge decides a constitutional question," declared Roosevelt, "and decides what the people as a whole can or cannot do, the people should have a right to recall that decision if they consider it wrong." He then quoted Lincoln's strictures on the Supreme Court in regard to the Dred Scott decision, and designated Lincoln's treatment of the court as a successful application of the principle of recall. He defended the wisdom of the people as against that of the courts in the following words:

I do not say that the people are infallible, but I do say that our whole history shows that the American people are more often sound in their decisions than is the case with any of the governmental bodies to whom, for their convenience, they have delegated portions of their power. If this is not so, then there is no justification for the existence of our government; and if it is so, then there is no justification for refusing to give the people the real, and not merely the nominal ultimate decision on questions of constitutional law. Just as the people, and not the Supreme Court under Chief Justice Taney, were wise in their decisions of the vital questions of their day, so I hold that now the American people as a whole have shown themselves wiser than the courts in the way they have approached and dealt with such vital questions of our day as those concerning the proper control of big corporations and of securing their rights to industrial workers.

Roosevelt also brought out in bold relief his conception of the connection between constitutional law and the new conditions of our social and industrial life. He attempted to link constitutional practice with social policy. He declared that new conditions had arisen to which it was necessary to apply new rules. Moreover, what would have been an infringement of liberty years ago might today be a safeguard of liberty, and what would then have been an injury to property might today be regarded as the enjoyment of property. He regarded the great mass of our judicial officers as alive to these conditions, and our judicial system as sound and effective at the core. The judiciary, too, was the safeguard of liberty and justice, which principles stood at the foundation of American institutions. He declared, however, that certain members of the judiciary did not realize that old principles required new applications. He regarded the preservation of liberty in a purely technical form in some cases to be the withholding of liberty in any real and constructive sense. For example, he declared that the denial of certain rights on the ground that they interfered with the liberty of contract, which was often a mere academic liberty, was the negation of real liberty. He pointed out that the judges in their interpretations necessarily enacted into law a system of social philosophy. Their decisions on economic and social questions, he set forth, depended on their economic and social philosophy more than on anything else. It was therefore of paramount importance that the judges should hold a twentieth-century view of social and economic questions, and should not adhere to a school of thinking which was outgrown and the product of primitive economic conditions. Opposed to the Rooseveltian view is a large body of opinion

among lawyers of the country, who hold to the theory that judges in making their decisions are little influenced by their own political, economic, or social philosophy. Their decisions, it is maintained, depend upon a large number of factors, no one of which is paramount. In each case they must apply the law as they understand it. Somewhere between the advocates of popular control of the courts and the advocates of executive appointment lies a mean under which the judiciary could function with substantial satisfaction to all parties concerned.

III. Municipal Courts

One of the most distressing problems in city government is the control of the police system. The safety, morals, and security of the city are no stronger than its police department. A somewhat neglected field of police control is the municipal court system. No matter how effective a police department may be in the apprehension of criminals, the judges of the city courts may entirely neutralize the good effects of a fairly rigid program of law enforcement. The necessary complement of a good police force, then, is an efficient administration of justice within the city. The first line of local defense may be said to be the city courts. The importance of the local administration of justice to the people is pointed out by Charles E. Hughes in the following words: "Justice in the minor courts—the only courts that millions of our people know—administered without favoritism by men conspicuous for wisdom and probity, is the best assurance of respect for our institutions." We have neither the time nor the interest to trace the evolution of municipal courts in the United States. The first municipal courts were those of the aldermen, mayors, or recorders. These men were not legally trained, but were invested with a certain judicial capacity. As their executive and administrative business increased, the judicial function was in some cases surrendered to a special official or tribunal. In some of the states the Justices of the Peace administered municipal justice; in others they carried on judicial functions within cities, even though township or county officials. In all judicial areas this office was subject to the same abuses. The multiplicity of cases, the untrained judges, the lack of organization and records of proceedings, and, what is more important, the lack of a judicial spirit, all operated to condemn the old system of city courts. Special municipal courts were established in the larger cities to deal with particular classes of violations of the law. Sometimes these

special courts existed alongside the older courts. In time so intolerable a situation had to yield to a single judicial system for one city. There might be many divisions of this court, according as litigation should require. The same development has been followed in large measure throughout the country. This court has practically exclusive jurisdiction over petty cases; it deals with minor civil cases, with offenses within the class of misdemeanors, with violations of city ordinances, and with the preliminary stages of criminal cases under which the prisoner is bound over to a higher court. In some of the larger cities there are higher municipal courts of appellate jurisdiction. Police courts are municipal courts as described above, except that they do not deal with civil cases. The advantages flowing from the newer tendency in municipal courts are obvious. The payment of reasonable salaries has abolished the indefensible and much abused fee system. The judges must be trained in the law and admitted to the bar, and they are given a longer tenure than the judges of the old city courts. Chief Justice McAdoo of New York City, the head of the judicial system of that great metropolis, would grace the bench of any of our state or federal courts. While much remains to be done in improving the administration of municipal justice, the situation is now far more encouraging than ever before.

IV. Nature and Sources of Law

Equity.—Under the Roman law and the English common law, equitable developments took place to remedy the defects of the all too rigid ordinary law. Under the Roman system private law was first applied to Roman citizens, who alone could share its benefits. It was chiefly private in character. The resident or sojourning alien had no rights, and was entirely outside the pale of law. The development of Rome as a commercial center brought to the city many merchants from the neighboring Mediterranean shores. Some law was necessary to protect these aliens, whose presence was a financial benefit to the Romans, and also to govern their commercial transactions. The law of Rome was administered by the *praetor,* who came to be known as the *praetor urbanus,* charged with the application of the private law of Rome to cases between Roman citizens exclusively. Where the litigants were aliens or an alien and a Roman, the case was different. There was established the *praetor peregrinus,* an official who presided over these cases. The law he applied was called the *jus gentium,* or the laws and customs of the tribes and nations

of the Mediterranean area. These laws were less rigid than the Roman law, and their fusion led to even less rigidity. The citizens of Rome, finding that aliens enjoyed a more liberal administration of law than they themselves did, began to claim some of these advantages. Gradually, a levelling process was carried on. The extension of Roman citizenship, and the membership of the world in the Roman imperial system, completed the process of fusion, and the old law gave way to the new.

Similarly, the common law, due to a certain rigidity, has been supplemented by an equitable development. Before the Norman Conquest, justice in England was administered by the people's courts, and the law supplied was unwritten; it was largely handed down by oral tradition. After the Conquest the theory as the king as the fountain-head of justice, and the justices of his agents, prevailed. The King's Court crowded out the Anglo-Saxon courts and continued for centuries as an agent of the crown, until the independence of the English judiciary was established. The judges had to justify the law applied. There were no statutes in early England, so that the courts decided cases in accordance with earlier decisions and, in the absence of such precedents, by a process of judicial reasoning which soon became traditional. Adherence to precedent was fixed in the minds of the judges, and they were powerless to afford relief from the formal and rigid system of their own creation, when remedies were demanded which were not covered by their own forms of action.

Relief from the common law could be had upon appeal to the king, who in turn asked the advice of his secretary or chancellor. In time the business of relieving the defects of the common law required the creation of a separate court for the chancellor, which came to be known as the Court of Chancery or Court of Equity.

Objection was not limited to the rigidity of the common law. It was negative in nature and could command the parties only through the extraordinary remedy of *mandamus*. Equity can command the defendant. Again, the common law dealt only with two parties; whereas equity can deal with any number of parties, settling the rights of each against the other. The law courts usually wait until a wrong is committed and then redress it. The court of equity assumes a preventive jurisdiction, and will enjoin the threatened injury.

The nature of equitable remedies is disclosed in part by the so-called "maxims of equity," which are: (1) Where there is a right, there is a remedy; (2) equity regards substance rather than forms; (3) equity imputes an intent to fulfill an obligation; (4) equity acts

specifically and not by way of compensation; (5) equity follows the law; (6) between equal equities the law will prevail; (7) between equal equities the first in order of time prevails; (8) he who seeks equity must do equity; and (9) a rule of equity will never be applied to reach an inequitable result.

Private Law.—Thomas E. Holland defines a private person as "an individual, or collection of individuals however large, who, or each of whom, is of course a unit in the state, but in no sense represents it, even for a special purpose." The relations between private persons and the enforcement of their private rights are regulated by private law. In the American system the citizen of a state lives under the jurisdiction of state law, by which most of his private relations and affairs are regulated. In the domain of private rights, such as private property, contracts, and domestic relations, the power of the state is supreme as against the power of the federal government. Private law embraces, among others, the law of torts, of contracts, of domestic relations, and of associations.

A tort is a private wrong or injury. Where a tort is alleged, two or more private individuals are parties to the suit. It is an offense against the individual, and is usually redressed by compelling the tort-feasor to compensate the party against whom the tort has been committed. Personal torts include assault and battery, false imprisonment, slander, libel, and deceit. Trespass is the most common wrong to possession and property. The wrongs to personal estate and property are nuisance and negligence.

Anson defines a contract as an "agreement enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others." Justice Holmes defines a contract as "the taking of a risk," and declares that a man, making a promise, has in mind, not the performance of a promise, but the legal consequences in the form of damages for its breach. Anson declares the requisites of a contract to be: (1) offer and acceptance; (2) agreement made in a form prescribed by law, as consideration; (3) contractual capacity as regards the parties; (4) genuine consent expressed in the offer and acceptance; and (5) legal purpose and objects of the contract. The usual classes of contracts are sales, bailments, negotiable instruments, guaranty, suretyship, and insurance.

The law of domestic relations defines and regulates such legal relationships as husband and wife, parent and child, and guardian and ward. This law centers about the legal relation of marriage, which is both a contract and an institution. The law of associations applies

to such legal associations as partnerships, joint-stock companies, and corporations.

Legal rights include rights *in rem,* which are enforceable against the whole world; and rights *in personam,* which are enforceable only against particular persons. The fundamental rights *in rem* are those of personal security, of personal liberty, and of private property. Ownership of property, while considered absolute in the holder in fee simple, is limited by the rights of others, by liability for debt and taxes, by the right of eminent domain, and by the police power of the state.

Public Law.—Law is essentially concerned with rights and their enforcement. The public or private character of the person asserting the right has furnished a very fundamental basis for the division of law into public and private. Says Holland: "By a 'public person,' we mean the state, or the sovereign part of it, or a body or individual holding delegated authority under it." Relations between the state and the citizen, subject or alien, and between state and state, are regulated by public law. The main divisions of public law are: (1) constitutional law, (2) administrative law, (3) criminal law and procedure, (4) the law of municipal corporations, and (5) international law.

Constitutional law is concerned with the provision of a framework of government, the definition of the rights and duties of the government, the distribution of powers, the mode of exercising the powers of government, and the limitation of those powers in the interest of maintaining civil and political liberty. In the United States constitutional law concerns in large measure the relations between the state and the nation, and between the government and the individual. It embraces such subjects as the federal system, the jurisdiction of courts, international relations, citizenship, the impairment of contractual obligations, the regulation of commerce, taxation, money, the police power, due process of law, and the equal protection of the laws.

Administrative law is defined as that part of the law which governs the relations of the executive and the administrative authorities of the government. Professor Goodnow has said that "administrative law is therefore that part of the public law which fixes the organization and determines the competence of the administrative authorities, and indicates to the individual remedies for the violation of his rights. . . ." It is concerned with the relations and the organization of the administrative authorities.

Criminal law deals with crimes, or public wrongs. A crime is

defined as "a violation or neglect of legal duty of so much public importance that the law, either common or statute, takes notice of and punishes it." Crimes are defined by both the common and the statute laws. The common law prevails in most of the American states, except as modified by statute. Common law crimes are, in legal contemplation, unknown to the Government of the United States. Its criminal jurisdiction depends upon statutory provision, authorized by the Constitution. Treason is regarded as the greatest crime. It is a direct attack upon the government itself and affects the foundations of society. It may take the form of levying war against the state, or of adhering to its enemies or giving them aid or comfort. A felony is a crime resulting in the forfeiture of the estate of the guilty one; it is also, in some cases, punishable by death. The common law tests have given way to tests imposed by statute, which usually prescribe death or imprisonment in a state prison. Misdemeanors are all other crimes not classified as treason or felonies, and are acts of less criminal degree. In a criminal action the state always appears as a party to the case.

The law of municipal corporations has to do with the rights of cities under the national and state constitutions, their powers under the charters, and questions relating to public easements, public utilities, and municipal liabilities. The city is a municipal corporation, having the power to sue and be sued, to acquire, hold, and dispose of property, to pass ordinances, to levy and collect taxes, and to exercise the right of eminent domain. The law defining and guaranteeing these rights is that of municipal corporations.

International law may be defined as the body of rules prevailing between the members of the family of nations, which, in turn, may be defined as a group of sovereign and independent states, each mutually recognizing the independence and the equality of the other. The subjects of international law are sovereign states. The sources of international law include custom, the decisions of international tribunals and municipal courts, diplomatic papers, treaties and conventions, legislation, the works of authoritative writers, and the conduct of nations. International law is recognized as a part of the law of the land in the United States, and is enforceable in our courts.

Trial by Jury.—The Constitution of the United States makes the following provision with respect to trial by jury: "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be

at such place or places as the Congress may by law have directed.'' The same provision is in substance duplicated in the state constitutions.

No legal institution is more typical of Anglo-American jurisprudence than that of trial by jury. The right is fundamental, and is guaranteed by provisions of the state and federal constitutions. Some advocates of judicial reform regard these provisions as an obstacle to progress. Trial by jury is the result of evolution. The jury as we know it today is far different from what it was in its original form. The modifications have been the result of a steady adaptation to need, and not of sudden changes of a fundamental nature. Edmund Burke declared: ''To suppose that juries are something innate in the constitution of Great Britain and that they have jumped like Minerva out of the head of Jove in a complete armor, is a weak fancy supported neither by precedent nor by reason.'' The development of the jury system in England is easy to trace. The form of its first introduction into America did not persist, and the constitutional amendment guaranteeing it did not introduce into our system of jurisprudence anything which was not there before.

The several state constitutions carry a general guarantee of trial by jury. It usually reads that ''the right of trial by jury shall remain inviolate,'' or that ''the right to trial by jury as heretofore enjoyed shall remain inviolate.'' The Seventh Amendment to the Constitution of the United States provides that ''in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined by any court of the United States than according to the rules of the common law.'' This provision binds the federal and territorial courts, but does not extend to the state courts. According to the federal and state constitutions, therefore, abolition or serious modification of the jury system is placed beyond the power of the legislature. Trial by jury is not defined by the constitutions, national and state. The courts look to the common law of England rather than to any particular form of its application in a certain colony. It is also to be observed that only the fundamental and essential characteristics of the jury system cannot be changed by the legislature. Whatever is inherent in the system, and necessary to its preservation, must remain. Everything else may be changed.

What are the elements of the jury system, the destruction of which would result in its virtual abolition? One of them is the number of jurors. *Magna Charta* does not refer to this question. Twelve was at

first the usual but not the exclusive number. Like the number "seven" in religion, the number "twelve" has acquired a reverence and a practice which makes it an element of the system. Some states have, by constitutional amendment, allowed juries of less than twelve men. Another elemental requirement is the unanimous concurrence of the jurors in the verdict. This is not true of any legal system other than the Anglo-American, and was not true of the early English system. Pressure was sometimes used to force a concurrence of the dissenting twelfth juror, and in modern times jurors have been allowed to wear themselves into agreement. The principle of unanimity cannot be changed by the national legislature. Some states have made constitutional provision for a verdict by less than the entire jury in civil cases. Moreover, the selection and constitution of the jury should result in an impartial and substantially competent tribunal. Any action which excludes all members of a class from a jury deprives a member of that class of the right of trial by jury, of the equal protection of the laws, and of life, liberty, and property without due process of law. Any provision which allows the biased or prejudiced person to serve on a jury is a violation of the right to trial by jury. Similarly, the province of the jury is essential to its preservation. It is, of course, presumed to determine only such matters as are properly within its province. During the Stuart period in England, popular resistance to judicial coercion of jurors was at its height. Juries and their supporters contended that they were the judges both of law and fact, and judges in many cases were regarded as ciphers. By the Act of Settlement of 1700, judges held office, not at the pleasure of the king, but for life or good behavior. Thereafter the judges enjoyed the confidence of the people. At the time of the American Revolution it was settled in English law that juries should answer to questions of fact and judges to questions of law. The court may, however, without violating the constitutional provision, hold the jury to its sphere of determining questions of fact or to reasonable methods in the determination.

Reform of the jury system with a view to increased efficiency in the administration of justice, within the limits of its essential elements, is the task of the legislature under the leadership of the bench and bar.

The Great Writs.—There are three great writs which are fundamental in the protection of the rights of citizens. The writ of *habeas corpus,* the first and foremost of the writs, secures to the imprisoned person the right to have a preliminary hearing in order to discover the reason for detention. The Constitution of the United States pro-

vides that "the privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion, the public safety may require it." Chief Justice Taney, in the case of *Ex parte Merryman* (Federal Cases No. 9487), contended that the right to suspend the writ of *habeas corpus* followed an enumeration of legislative —not executive—powers, and that it was generally understood that Congress only could lawfully exercise the right. This opinion was occasioned by the refusal of General Cadwalader to respond to a writ granted to one Merryman, accused of hostile actions against the Government of the United States. The General claimed the right, acting for the President, to suspend the writ. The Attorney-General gave an opinion to the effect that the President had the right to suspend the privilege of the writ of *habeas corpus* as regards persons having criminal intercourse with insurgents, or reasonably suspected of so doing, since he was charged under the Constitution to preserve the public safety and was the sole judge of when an emergency existed requiring the suspension. It was also declared that the President was answerable only to the high court of impeachment for his conduct. The President continued to suspend the writ and denied the right of the judiciary to intervene.

The writ of *mandamus* is used against public officials, private persons, and corporations for the purpose of compelling them to perform some duty required of them by law. It applies generally to the nonperformance by some executive official of a purely ministerial duty. Whatever is within the discretionary authority of the official is beyond the power of the courts. A writ of *mandamus* will lie to compel a lower court to decide some matter within its jurisdiction. An interesting question is whether a writ would lie to compel state legislatures to reapportion the legislative districts under the provisions of the state constitutions. Several state legislatures, notably those of California and Illinois, have steadily refused to perform this clear constitutional duty. Should the remedy apply, the apportionment secured might defeat the purpose of the applicants for the writ. Aggrieved districts must bargain for a compromise, or else, like the city of Chicago, threaten reprisals in the nature of the retention of taxes until the redistricting takes place.

The writ or bill of injunction is of general application. It usually directs a person to do or to refrain from doing certain things. It may be a mandatory writ requiring the performance of some act, or a temporary restraining order, or even a permanent injunction. Its application is of the greatest interest in industrial disputes, when issued

against men acting *en masse.* The celebrated Daugherty injunction of 1922, forbidding employees of railways engaged in interstate commerce to strike or to boycott the railways while in their employ, was ineffective when applied to large groups of men. The "defense of the realm act," passed in England during the war, became the "emergency powers act" after the war. It provided for trial by summary procedure of persons or groups of persons who, by the spoken or written word, or by act, interfered with the effective distribution of the so-called necessaries of life, such as coal, wheat, and other fuels and foodstuffs. This was virtually the application of the bill of injunction by positive law to a particular situation.

READING NOTES

The Federal Judiciary

It would be impossible to make more than a brief mention of the more general works on the federal courts. The material is voluminous, and an attempt at selection must be made. The literature of the constitutional convention, referred to in another chapter, should be consulted for the plans for the federal courts. *The Federalist,* Nos. LXXVIII–LXXXIII, give the federalist point of view as to the function, jurisdiction, and organization of the courts.

General works on the federal courts are: Baldwin, *The American Judiciary;* Judson, *The Judiciary and the People;* and Meigs, *Relation of the Judiciary to the Constitution.*

The best work on the Supreme Court is Warren's *Supreme Court in United States History* (3 vols.). The same author has written a briefer work on *The Congress, the Constitution, and the Supreme Court.* A handy small volume is Beard's *The Supreme Court and the Constitution.* Students having a legal interest should consult Countryman's *The Supreme Court of the United States and its Appellate Powers under the Constitution.* Another historical work is by Carson, *The Supreme Court of the United States: its History and its Centennial Celebration, February 4, 1890.* The international aspects of the court are presented in Smith's *The American Supreme Court as an International Tribunal.*

Leading works on the doctrine of judicial review are: Haines, *American Doctrine of Judicial Supremacy;* Corwin, *The Doctrine of Judicial Review;* and Coxe, *Judicial Power and Unconstitutional Legislation.*

The leading Constitutional decisions of the Supreme Court, and controversies in regard to the highest tribunal are set forth in Martin's *Introduction to the Study of the American Constitution.*

The State Courts

Chapters on the state courts may be found in the works on state government by Dodd, Holcombe, and Mathews. The works by Judson and Baldwin, cited above, treat also of the state judiciary. The student should read Bruce's *The American Judge.* Legal reform is discussed by the following books: Storey, *Reform of Legal Procedure;* Smith, *Justice and the Poor;* Works, *Juridical Reform;* and Alger, *The Old Law and the New Order.*

The Municipal Courts

Discussions of municipal courts appear in the books on municipal government by Munro, Beard, James, Goodnow and Bates, Maxey, Anderson, and Reed. An illuminating work by Chief Justice McAdoo of New York City is entitled *Guarding a Great City. Justice and the Poor,* by R. H. Smith, published by the Carnegie Foundation, contains much valuable material with reference to municipal justice and the unfortunate. *Criminal Justice in Cleveland,* by the Cleveland Foundation, is the result of the collaboration of a number of experts, and should be consulted by all students of municipal justice.

The Law

Blackstone's *Commentaries on the Laws of England* was the textbook of the budding lawyers of the colonial and revolutionary periods. It is only within the last two decades that the law schools are supplanting the office and Blackstone-trained practitioner. The *Spirit of the Common Law* is an interesting contribution by Dean Roscoe Pound of the Harvard Law School. The student should also consult Dean Pound's *Introduction to the Philosophy of Law,* and his *Interpretations of Legal History.* A standard text is Holland's *Jurisprudence.* Sir Frederick Pollock has made two excellent contributions to the general science of jurisprudence: *First Book of Jurisprudence,* and *The Genius of the Common Law.* Associate Justice Oliver W. Holmes of the United States Supreme Court has set forth the merits of the common law in his *The Common Law.* Markby's *Elements of Law* and Salmond's *Jurisprudence* are good general references. No student should overlook Vinogradoff's *Common Sense in Law.*

As an introduction to the British Constitution, the student is referred to Dicey's *Introduction to the Study of the Law of the Constitution.* Burdick's *Law of the American Constitution* will serve as an adequate treatise of American constitutional law. A non-technical approach is found in Martin's *Introduction to the Study of the American Constitution.*

Textbooks on international law have been prepared by Lawrence, Hall, Westlake, Oppenheim, Wilson and Tucker, and Hyde. A more recent work is the admirable book *International Law,* by Fenwick. For administrative law, or the law of public officers, the student is referred to Goodnow's *Principles of the Administrative Law of the United States.* References have already been made to the law of municipal corporations.

CHAPTER IX

THE BUSINESS OF GOVERNMENT

I. The Nation's Business

Cabinet Origins.—In all discussions of American political institutions the inevitable tendency is to seek the British and colonial counterparts. This is helpful insofar as it explains the origins of our political institutions; but it is unfortunate when an attempt is made to explain the later developments of an institution in the light of its past, if the connection between the two is slight. The state governments were the earliest American administrative units. The background of all administrative cabinets and boards today is the Privy Council of Great Britain. There is virtually no relation between the later developments of the British ministry and the American cabinet. The charters granted by the crown to the colonies provided for the governor's council, which, as we have seen, aided the governor in his administrative and judicial functions, and served as an upper house of the colonial legislature. Its share in administration and in legislation not only was large, but might be conclusive. When the state constitutions were adopted, the governors' councils were either continued as legislative bodies, or else were divorced from their legislative functions. In time they disappeared, and there was little in the governor's council which could serve as a model for the President's cabinet.

The movement for independence required the establishment of a government in order to carry on the war. The Departments of Foreign Affairs, Finance, War, and Post Office were established. In the first instance they were merely committees of the Continental Congress; later they were constituted as separate bodies, and finally they emerged as departments presided over by executive heads. During the later stages of the Revolution, Alexander Hamilton suggested the organization of executive business along the lines of the French administrative system. In 1781 Congress by resolution created the offices of Secretary of Foreign Affairs, Superintendent of Finance, Secretary of War, and Secretary of Marine. The officials appointed to these positions did not serve as a cabinet in any collective capacity.

The general problem of an executive council engaged the attention

of the members of the Constitutional Convention. While the specific problem of a single or plural executive was settled by the adoption of the former, an executive board with which the President might consult, and to which he might delegate appropriate administrative authority, was constantly in the minds of some of the framers. During the debate on the question of a single or plural executive it was pointed out by Roger Sherman that a council of advisers such as existed in the states and was associated with the governors should be duplicated in the case of the federal executive, in order that the plan of the convention might be acceptable to the people. Oliver Ellsworth suggested that a council should be constituted of the President of the Senate, the Chief Justice of the Supreme Court, and the Ministers of Foreign and Domestic Affairs, War, Finance, and Marine, with the authority to advise but not to bind the President. Charles Pinckney observed that the President should seek its advice at his own discretion, as the strength or the weakness of the council might dictate. Gouverneur Morris and Charles Pinckney definitely suggested the establishment of a Council of State, which should consist of a Chief Justice of the Supreme Court and five of the heads of the executive departments to be appointed by the President. A germ of ministerial responsibility is disclosed in this proposal. The President could ask for the collective judgment of the council, arrived at through discussion, and could require written opinions of one or all of its members. His acceptance of their views was entirely optional. Each secretary, in matters concerning his own department, was under an individual responsibility. The Committee of Detail reported this resolution, with the addition of the President of the Senate and the Speaker of the House of Representatives as members. The body was to be styled the "Privy Council." This clause was finally rejected, and it was agreed that the appointing power of the President should extend to certain designated officials, and to all others whose appointments were not otherwise provided for, and that the President might "require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices." Another supporter of the executive council was George Mason of Virginia. He urged that one be established to be composed of six members: two from the New England States, two from the Middle States, and two from the Southern States. This regional districting of the cabinet found support in Franklin and Madison. While Franklin observed that such a council would restrain a bad President and aid a good one, Gouverneur Morris objected that the chief executive

would, through the concurrence of such a body, find support for his unworthy measures. Consequently, the proposal was not accepted. After the Constitution went into effect, legislation was passed to provide for the establishment of the more necessary executive departments. On July 27, 1789, the Department of Foreign Affairs was established, and on September 15 of the same year it became designated as the Department of State. The Department of War was created on August 7, and the Treasury Department on September 2, of the same year.

The Department of State.—The organization, functions, and personnel of the Department of State are fully described in Part III of this volume.

The Treasury Department.—The first appointee as Secretary of the Treasury under the Constitution was Alexander Hamilton. While he carried the title of Secretary, his conception of the office was that of Minister of Finance or of the Treasury. Hamilton held very definite ideas as to the power of the executive, but he was just as clear in his view of the part to be played by the executive's chief lieutenants. The head of the financial department of the government, in his opinion, should not be merely an officer of administration, but should lead in matters of financial policy. He felt that the heads of departments, and especially the Secretary of the Treasury, should communicate directly with the Congress. Through this communication the Secretary might give point and direction to financial policy, and might induce the legislature to encourage sound financial practices. The original Treasury Act provided that the Secretary of the Treasury should make reports in person or in writing at the direction of the Congress. This unique provision, establishing both a channel of communication and a responsibility for the Treasury Department, was not duplicated in the other departmental bills.

Hamilton immediately set himself to the task, not only of reorganizing our national finances, but of securing the adoption of important financial policies. We have already adverted to his celebrated reports on the funding of the national debt, on the assumption and funding of the state debts, on excises, on the Bank of the United States, and on manufactures. These great questions of policy and administration were settled virtually as Hamilton wanted them settled; he was to all intents and purposes both a financial minister and a financial administrator. Indeed, his view of his function as Secretary of the Treasury did not stop with the business of his own department. Where the interests of the Treasury invaded other departments of govern-

ment, Hamilton ignored all departmental lines, theoretical and actual, and pressed his own case. This partial interference extended into the fields of foreign affairs, justice, and war, and it was especially irksome to his leading opponent, Thomas Jefferson.

The functions of the Department of the Treasury are probably more varied and more extensive than those of any other executive department. It is the money-collecting and tax-gathering bureau of the great American Government. Upon the adoption of the Sixteenth Amendment, Congress was authorized to pass an income tax law. This was done in 1913, and the income tax is now one of the leading sources of federal revenue. The Commissioner of Internal Revenue, with a vast army of collectors and revenue agents, performs this important task. Another large source of federal revenue is the customs duties levied on articles imported into the country under the tariff laws. The Director of Customs, aided by a staff of collectors and appraisers, assesses and collects the customs charges. The Bureau of Internal Revenue Service is also charged with the collection of various miscellaneous taxes. The Treasury Department supervises the Bureau of the Mint, where American metallic money is coined, and the Bureau of Engraving and Printing, where all paper money is prepared. The national banking system is under a limited supervision of the Comptroller of the Currency. Examinations of the national banks are conducted from time to time, and reports on their condition are forwarded to this official. A large task of the Treasury Department has to do with the expenditure of government funds as authorized by law. It is therefore both a receiving and a disbursing agency of the government. Today the Treasury Department is charged with the important responsibility of preparing the governmental budget for the Chief Executive. The Bureau of the Budget was established by act of Congress in 1921.

The Treasury Department, while essentially a financial bureau of the government, must perform a number of seemingly extraneous functions. Step by step some of these major functions have been transferred to other departments, or else new departments have been created to assume them. During the Great War the Treasury Department administered the war-risk insurance for members of the armed forces; today this work is under the charge of the Veterans' Bureau. The Coast Guard is chiefly an aid to navigation. The Public Health Bureau, as an administrative agency, supervises the quarantine service and the public health organization of the government; and, as a research bureau it carries on investigations in the field of public health. One of the important problems of the Treasury Department is the

enforcement of the Eighteenth Amendment and the famous Volstead Act. For this purpose there is established a prohibition unit under the direction of an Assistant Secretary of the Treasury. It has been suggested that this work, due to its non-financial and police character, should be transferred to the Department of Justice. The difficulties of enforcing this law are clear to all, and many charges have been made against the Secretary of the Treasury for laxity in the matter. The reply that the department has many other things to do, and that as faithful an enforcement of the law is secured as the government resources permit, can hardly be disputed. Governor Pinchot of Pennsylvania severely criticized the national administration for not giving more direct attention to the enforcement of the prohibition law, and declared that the President, by putting all the power of his office behind the amendment and the law, could bring about substantial compliance with its provisions.

At the head of the department is the Secretary of the Treasury, who holds membership in the President's cabinet. As the chief executive officer of the department, he has a large appointing power, due to the vast army of assistants required by the work of the department. He has general charge, under the President, of the administration of the financial affairs of the country. He has close contact with the President and the party leaders in Congress, and therefore strongly influences American revenue policy. He also must promulgate and enforce many rules and regulations growing out of the laws committed by Congress to his care. Much of his work involves consultation with Congress in regard to appropriations and other congressional legislation. An Under-Secretary, next in rank to the Secretary himself, has under his control the Commissioner of Acts and Deposits, the Federal Farm Loan Bureau, the Section of Statistics, and the Government Actuary. There are three assistant secretaries having charge, respectively, of the fiscal offices (the Treasurer of the United States, the Comptroller of the Currency, the Commissioner of the Public Debt, Bureau of Engraving and Printing; Mint Bureau, Secret Service Division, Disbursing Clerk, and the Section of Surety Bonds of the Division of Appointments); of Internal Revenue, and miscellaneous offices (the departmental executive offices, General Supply Committee, Bureau of Internal Revenue, Public Health Service, and Supervising Architect's Office); and of customs, the Coast Guard, and prohibition enforcement. Finally, there is the Bureau of the Budget.

The War Department.—The War Department was established in 1789 with General Henry Knox as Secretary, and was continued by

Washington from the war organization established under the Articles of Confederation. The main function of the department is the management of military affairs. It is the business of the department to recruit and maintain the army of the United States. It therefore administers the business of enlisting and discharging men from the service. The coast defenses, troops, munitions, supplies, and other matters incident to the maintenance of an army are cared for. The training of officers is provided for through the United States Military Academy at West Point. A number of offices, bureaus, commissions, and boards discharge the important military functions. The department must propose plans for the defense of the country and must have charge of the training of the soldiery. The Secretary of War is usually a civilian officer who exemplifies the American idea that military affairs must from the standpoint of policy be determined by the civil authorities of the country. The Secretary recommends to the President the appointment of civil and military officers within the scope of his department. He is aided by a General Staff, which gives provisional advice and makes plans for the national defense. Nonmilitary functions include the construction of public works and the improvement of rivers and harbors. One of the most important functions of the department is the administration of our dependencies. This is done through the Bureau of Insular Affairs, which is the colonial department of the government. This bureau was created in 1898 to administer the territory acquired from Spain. The Philippine Islands, the Panama Canal Zone, and Porto Rico are now under the control of the Department of War.

The Navy Department.—The Department of the Navy was established by act of Congress on April 30, 1798. President Adams encountered difficulty in filling this post. It was refused by ex-Senator George Cabot of Massachusetts, but was accepted by Benjamin Stoddert, a prominent merchant of Maryland. The Secretary of the Navy must administer the naval establishment of the United States, under the laws or under the direction of the President, and he must advise the chief executive and Congress with respect to naval policy. He has a large ordinance power with respect to the administration of the navy, the navy yards, naval stations, the insular possessions, and the use of naval reservations. The department has charge of the recruitment and training of the naval service and the training of officers at the United States Naval Academy at Annapolis, and the Naval War College at Newport. It has an important purchasing function in regard to munitions, and in some cases has charge of the actual construction

of ships in the navy yards. The department also administers some of our possessions which are of strategic importance, including the Virgin Islands, Guam, and Tutuila (American Samoa). Associated with the Secretary of the Navy is an Assistant Secretary who has charge of the executive office. The office of naval operations is administered by the Chief of Naval Operations, who also controls the Naval War College. This office advises the Secretary of the Navy as regards movements of the American fleet. Attached to the department is the office of the Judge Advocate General, the duties of which are chiefly legal. The Marine Corps, an infantry organization which serves on shipboard, is under the Secretary of the Treasury.

The Department of Justice.—The first Attorney-General of the United States was Edmund Randolph of Virginia, who was appointed on September 26, 1789. This department, as we have already discovered, is the law department of the government, and the Attorney-General is the leading law officer. The Attorney-General is both an executive and policy-determining official. A large part of his work has to do with legal advice given to the President, or to his colleagues in the cabinet, or to other officers of the government. He is the directing head of the law officers in the conduct of governmental litigation. He administers the prisons of the United States, advises the President with respect to pardons and reprieves, and issues regulations authorized by the prison boards with respect to parole. He has general appointing power of the solicitors, attorneys, and assistant attorneys of the United States, and recommends to the President the appointment of judges of the lower federal courts. The Solicitor General is the main advocate for the government and appears before the courts for the United States. There is an assistant to the Attorney-General who has charge of anti-trust litigation. There are seven Assistant Attorneys-General, having charge respectively of: (1) the defense of suits; (2) public lands; (3) criminal laws; (4) admiralty, foreign relations, territorial and insular matters; (5) taxation and prohibition; (6) customs division, and (7) the executive officers. There are six solicitors for other departments of the government, an Office of Pardons, a Bureau of Investigation, and a War Transactions Section. The leading functions of the department are, of course, first, to advise the President and his lieutenants with respect to legal questions; and second, to prosecute cases to which the United States is a party.

The Post Office Department.—A postal service was established during colonial days. A formal department was not organized until

March 9, 1829, when William T. Barry was appointed Postmaster-General. This appointment fell to Andrew Jackson. The Post Office Department had been under the control of Postmaster-General McLean, who had been appointed by Monroe and continued in the office under Adams. McLean, while favorable to Jackson, did not like to see his own appointments disturbed. He was accordingly given a post on the Supreme Court, whereupon Barry was appointed. The dignity of cabinet membership, accorded the Postmaster-General during Jackson's administration, really made that department directly subject to the claims of party patronage. The position of Postmaster-General often falls to the Chairman of the National Committee of the successful party. The business of this most important department is the general administration of the postal service. Postal treaties with foreign governments are negotiated with its coöperation. The appointing power of the Secretary is extensive. In addition to the carriage and delivery of mails, and the maintenance of post offices throughout the country, related services have been added. The registration of letters, city delivery service, the money order system, and rural delivery are regarded today merely as arrangements of a completed postal service. The Postal Savings Division was established in 1911 for the purpose of encouraging thrift on the part of the American people. Many persons having no banking or business connections, and having every confidence in their government, are thus provided with a secure means of depositing their savings with the additional assurance of a modest profit. The parcel post system was inaugurated in 1913, and has provided a needed service throughout the country. The Air Mail Service was first attempted in 1918, and has gradually been enlarged and extended. In time it is to be expected that the air mail fleets of the department will doubtless girdle our country from Canada to Mexico and from sea to sea. There are four Assistant Postmasters-General, each of whom has charge of a number of administrative divisions; and in addition there is a Chief Inspector, a Purchasing Agent, a Comptroller, and a Solicitor.

The Department of the Interior.—The Department of the Interior was established in 1849. Previously suggestions had been made to the effect that a certain department should be charged with the administration of the country's domestic affairs not falling properly within the scope of the other departments. The acquisition of territory following the Mexican War made necessary a department of this kind. It was established during the administration of President Polk, but the appointment of the first incumbent was made by President Taylor,

who on March 8, 1849, appointed Thomas Ewing of Ohio to the post. It should be observed that the Department of the Interior is not analogous to departments of similar designation in European countries. In a unitary state, such as France, this department has direct control over the personnel, the machinery, and the administration of the local government units. In a federal state, such as the United States, such a function is impossible, and the Department of the Interior is entrusted with the discharge of a number of miscellaneous functions which do not fall to the lot of other departments. It is really a department of home affairs. One of its leading functions is the control of Alaska and Hawaii, which are territorial governments of the United States. The relation of the department to these governments is defined by law. The National Park Service has charge generally of the maintenance and care of the national parks throughout the country. The General Land Office performs an important function in connection with the administration of public lands. The lease, sale, and opening to the public of these lands through the Homestead and Desert Acts is a part of the public land business. The Reclamation Service, presided over by a Commissioner of Reclamation, attends to rescuing from the desert and arid regions, for agricultural use, such lands as may, through the maintenance of irrigation works, be reclaimed. At the present time a policy of retrenchment is urged by this office, and some reclamation projects may be abandoned on account of their exorbitant cost. The Bureau of Education has no direct authority in educational matters except in Alaska, and with regard to the disbursement of certain funds for schools of agriculture and mechanical arts. It is a service and research department, which for the time being serves as an integrating force of the rather diversified American educational interests. The Indian Office administers the Indian reservations, and looks after the welfare and financial interests of the Indians. The Pension Office takes care of pension claims and disburses pension payments authorized by law. The Geological Survey performs, as the title implies, the technical services with respect to the water, mineral, and topographical conditions of the country. The Alaskan Railway is under the supervision of the department. Certain welfare institutions, and Howard University, share its protection. Associated with the Secretary of the Interior are two Assistant Secretaries having charge of the offices, bureaus, and divisions which have been described.

The Department of Agriculture.—The agricultural interests for a long time sought representation in the cabinet. The Department of

Agriculture was first established in 1889. On February 13, of that year President Cleveland appointed Norman J. Coleman of Missouri to the office of Secretary. It is essentially a service department and has been fortunate in not having added to it a number of miscellaneous functions. The technical nature of its functions has resulted in less political interference than in most of the other departments. The Secretary has general charge of the promotion of agriculture, and the protection of the national forests and game. It is his duty to advise the President with respect to agricultural policies and with respect to the conservation of national resources. Associated with him are an Assistant Secretary, and the Directors, respectively, of Scientific Work, Regulatory Work, and Extension Work. The scientific work embraces the Bureaus of Entomology, Chemistry, Biological, Survey, Soils, Plant Industry, and Animal Industry. This is a technical service, designed to promote better methods of agriculture in all of its branches. The Director of Extension Work maintains contact with the public through the dissemination of agricultural information. The Director of Regulatory Work is an administrative official who enforces the laws of Congress which are committed to the Department of Agriculture. The Forest Service administers the national forests and promotes forest preservation. The Bureau of Public Roads has to do with the construction and maintenance of highways. The Weather Bureau performs the function indicated by the title. The Home Economics Bureau is interested in the training of women in the domestic arts. A most interesting bureau is that of Agricultural Economics. The realization has spread that the production of agricultural articles is only half the battle, and that the economic problems of the farmers require the attention of the government. The scientific work has been performed satisfactorily for a number of years. Much science, however, is of no commerical value unless the farmers can market their products. Accordingly, this bureau is interested exclusively in the economic aspects of agriculture.

The Department of Commerce.—The first Secretary of Commerce and Labor was George B. Cortelyou of New York, who took office under Theodore Roosevelt on February 16, 1903. President Roosevelt had urged the establishment of Department of Commerce in his Annual Message of December, 1901, and his position was strongly supported by the merchants and the manufacturers of the United States. On February 14, 1903, the act establishing the Department of Commerce and Labor was passed. The purpose of the Department was to foster, promote, and develop foreign and domestic commerce,

the mining, manufacturing, shipping, and fishing industries, the labor interests, and the transportation facilities of the United States. The American Federation of Labor was for a time opposed to a single department. The Secretary of Commerce is charged generally with the promotion of commerce and industry, and with the protection and regulation of navigation. The most important branch of the department is the Bureau of Foreign and Domestic Commerce. It is a service and research department, and maintains agencies throughout the world for the promotion of American foreign trade. It also collects and publishes information and statistics with respect to commercial and industrial conditions generally. What the Department of Agriculture is to the farmers, the Department of Commerce is to the businessmen; and it is becoming more and more the center of American commercial activity. The Census Bureau under this department conducts the census every ten years and publishes the information gathered. The Patent Office discharges the constitutional function of promoting science and the useful arts, through securing to authors and inventors the exclusive right to their respective privileges and discoveries. All applications for patents are made through this office. The Bureau of Standards makes records with respect to measurement standards which must be employed in many fields. A Fisheries Bureau has charge of research, promotion, and regulation of this industry. The Bureau of Navigation enforces the navigation laws, licenses radio operators and stations, and inspects vessels with respect to measurement and architecture. The Lighthouse Service maintains the lighthouses along our shores and on our navigable waters as an aid to navigation. The Coast and Geodetic Survey is an expert service which studies and charts the coastlines of American territory. There is also the Steamboat Inspection Service, which must inspect specified classes of domestic and foreign vessels. The Bureau of Mines, transferred by executive order of June 4, 1925, from the Department of the Interior, is charged with the general function of promoting the mining industry in the United States and of improving mining methods.

The Department of Labor.—The Department of Labor was organized in 1913 in order to foster, promote, and develop the welfare of the wage-earners in the United States, to improve their working conditions, and to advance their opportunities for profitable employment. At last, the laboring interests secured cabinet representation. The first appointee to this office was Luther B. Wilson. The Secretary of Labor is charged with the promotion of the welfare of labor and the regulation of immigration and naturalization. The first work of the

department was largely that of collecting and publishing information concerning the conditions, wages, and hours of labor, and concerning labor disputes, industrial conflicts, and industrial peace. In addition to the publication of information, the department has been influential in the settlement of a number of labor disputes. A Woman's and a Children's Bureau investigate and report on the condition of women and children in industry and promote the improvement of their working conditions. The work of the Bureaus of Naturalization and Immigration, charged respectively with the admission of aliens to citizenship and with the admission of aliens to our shores, is described fully elsewhere in this book. In addition there are the Division of Conciliation, the Employment Service, and the Housing Corporation. Associated with the Secretary of Labor are an Assistant Secretary and a Second Assistant Secretary. The work of the Department of Labor extends generally to labor statistics, to the settlement of disputes, to the problem of women and children in industry, and to the admission of aliens to the country and to citizenship.

The Growing Business of Government.—For hundreds of years the emphasis in the growth of the modern democratic state was placed upon the legislature. This tendency is seen especially in the government of England, which became the "mother of Parliaments." The legislature has long been regarded as a fountain of liberty and the basis of free government. With the great enlargement of governmental business the regulatory and quasi-administrative functions of the legislature and the administrative services of the state have increased. This has dictated the development of a trained corps of workers and of administration as a separate science. Today that democracy is the best which provides the greatest degree of efficiency of administration in government through the largest possible amount of popular control. This is an ideal difficult of realization. It is the people, through their duly constituted representatives, who determine what shall be done. The doing of the thing is the work of the expert, and the least possible interference with it on the part of the political branches of the government produces the best results. With administration now recognized as a separate science, certain rules have developed as regards law, personnel, and organization. From these rules, which are supposed to regulate the efficient administration of the law, the political functions of the government should insofar as possible stand aloof. The executive departments of the government, as exercised by law, have already been discussed. The relations of the cabinet to the President, to Congress, and to political parties

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The United States is the World's Biggest Business, With 113,000,000 Partners

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→ Centralized

LEGISLATIVE

Congress, which consists of the Senate and House of Representatives, makes the laws. There are 435 representatives and 96 senators. Representatives are elected to serve two years. Senators are elected for a term of six years. The Vice-President is president of the Senate.

EXECUTIVE

JUDICIAL

The judicial power of the United States is vested in one Supreme Court and in such inferior courts as Congress may ordain and establish. The judiciary construes the laws. The Supreme Court has nine members—a chief justice and eight associate justices.

The President is the executive head of the United States Government. The Cabinet acts in an advisory capacity and each member administers the duties of his department.

← Decentralized

→ Decentralized

Duties of the President

1) As executive power is vested in the President
2) Executes the duties of his office under oath
3) Administers and executes the laws of the nation
4) The President, with consent of Senate, appoints his Cabinet
5) He is to consult with the officers mentioned in his Cabinet
6) He has power to remove members of Cabinet at any time
7) By Commission in Chief of the Army and Navy, and of the Militia of the States when called into actual service
8) Grants reprieves or pardons for offenses, except in cases of impeachment
9) Makes treaties, by and with the advice and consent of the Senate, two thirds of the Senators present concurring
10) Appoints, by and with the advice and consent of the Senate, ambassadors, other public ministers and consuls.
11) Appoints, by and with the advice and consent of the Senate, judges of the Supreme Court and all other officers whose appointments may be authorized by law and not otherwise provided for in the Constitution of the United States
12) Appoints inferior officers when vested with this power by Congress
13) Fills all vacancies occurring in the recess of the Senate, by commissions which expire at the end of the next session of the Senate
14) Commissions all the officers of the United States.
15) Gives information to Congress of the existing conditions of the nation
16) Recommends to Congress such measures as he shall judge necessary to improve or facilitate them
17) In case of disagreement between the two houses of Congress with respect to the time of adjournment, he may adjourn them to such time as he shall think proper, not exceeding
18) Signs all bills and joint resolutions of Congress before they shall become laws
19) Returns any bill which he shall not approve to the House in which it originated, with his objections.
20) Approves every order, resolution or vote to which concurrence of both Houses, except on a question of adjournment
21) Returns orders and resolutions disapproved by him to be proceeded on as in the case of a bill.
22) Receives and installs and other public ministers.
23) Advises Congress, through the Secretary of Treasury, as to money needed to run government and asks passage of appropriation measures
24) He may require the opinion, in writing, of the principal officer in each of the Executive Departments.

Independent Executive Establishments

1) Smithsonian Institution.
 1) National Museum
2) National Gallery of Art.
3) International Exchange Service.
 1) Bureau of American Ethnology.
4) Astrophysical Observatory
5) National Zoological Park
6) International Catalogue of Scientific Literature.
7) National Home for Disabled Volunteer Soldiers
8) Civil Service Commission
9) Interstate Commerce Commission
10) Geographic Board.
11) Commission of Fine Arts
12) Rock Creek and Potomac Park Way Commission.
13) Bureau of Efficiency.
14) Federal Reserve Board.
15) Federal Trade Commission
16) National Advisory Committee for Aeronautics.
17) Employees' Compensation Commission.
18) Shipping Board.
 1) Emergency Fleet Corporation
19) Tariff Commission.
20) Federal Board for Vocational Education.
21) Alien Property Custodian.
22) Railroad Administration.
23) War Finance Corporation.
24) Railroad Labor Board.
25) Federal Power Commission.
26) General Accounting Office
27) Veteran's Bureau.
28) World War Foreign Debt Commission.
29) Federal Narcotics Control Board.
30) Personnel Classification Board
31) American Battle Monuments Commission
32) National Capital Park Commission.
33) Board of Tax Appeals
34) Office of Public Buildings and Public Parks of the National Capital.

(Continued in next column)

Duties of the Vice-President

1) Is President of the Senate
2) Has no vote unless the Senate is equally divided
3) Opens all the certificates of the electors in the presence of the Senate and House of Representatives, prior to the counting of the votes for President and Vice-President.
4) In case of the removal, death, resignation, or inability of the President, the powers and duties of his office devolve on the Vice-President.
5) If the House makes no choice of a President before the 4th of March next following the counting of the electors' certificates for President, then the Vice-President shall act as President.

Duties of the Secretary of State

1) To perform such duties as are imposed upon him by law, or entrusted to him by the President, in the conduct of foreign affairs and in dealings with governments of the states
2) To aid the President in the formulation of the foreign policy of the United States.
3) To meet and negotiate with representatives of foreign governments.
4) To promulgate rules and regulations affecting the Department and the Diplomatic and Consular Services.
5) To countersign and affix the seal to executive proclamations, commissions, and extradition warrants
6) To pass on all matters referred by the Solicitor to the Department of Justice
7) To approve all leases, bonds, and other similar documents
8) To recommend the appointment of all presidential officers in the department and to approve appointments under civil service rules and regulations.
9) To appear before congressional committees on matters of appropriations and proposed legislation affecting the department
10) Is a member, in various capacities, of several board commissions.

Departmental Divisions
Secretary of State.

1) Diplomatic Service.
2) Consular Service.
3) United States Sections, International Commissions.
4) Undersecretary of State
 1) Geographical Division (political questions)
 2) Division of Current Information
 3) Office of Coordination and Review
5) Assistant Secretary.
 1) Geographical Divisions (Political questions)
6) Assistant Secretary.
 1) Foreign Service Administration Division (Diplomatic)
 2) Office of the Chief Clerk
 3) Bureau of Indexes and Archives.
 4) Bureau of Accounts
7) Assistant Secretary.
 1) Foreign Service Administration Division (Consular)
 2) Consular Commercial Office
 3) Visa Office
8) Assistant Secretary.
 1) Division of Publications.
 2) Division of Passport Control
9) Office of the Economic Adviser

(Brought forward from first column)

Establishments Under Congressional Direction

1) Library of Congress.
2) Architect of the Capitol.
3) Government Printing Office
4) Botanic Garden
5) Miscellaneous Memorial Commissions
6) National Forest Reservation Commission.
7) Public Buildings Commission

Duties of the Secretary of the Treasury

1) To perform such duties as are imposed upon him by law, or entrusted to him by the President, in the administration of the financial affairs of the country.
2) To aid the President in determining the revenue and borrowing policy of the administration
3) To promulgate rules and regulations respecting the administration of the revenue laws, quarantine laws, and national bank laws, the use of government buildings and reservations under the control of the department, and the operation of various protective services
4) To pass upon all matters referred by the Solicitor of the Treasury and the Solicitor for Internal Revenue to the Department of Justice
5) To approve all leases, bonds, and other similar documents
6) To recommend the appointment of presidential officers in the department, and to approve appointments under civil service rules and regulations.
7) To pass upon the work programs prepared by the chiefs of the several offices, services, and bureaus.
8) To issue orders affecting the policies and programs of the different offices, services, and bureaus, and to effect interbureau co-operation
9) To appear before congressional committees on matters of appropriations and proposed legislation affecting the department
10) Is a member, in various capacities, of several boards and commissions.

Departmental Divisions

The Secretary of the Treasury

1) The Undersecretary of the Treasury.
 1) Commissioner of Accounts and Deposits.
 1. Division of Bookkeeping and Warrants
 2. Division of Deposits.
 2) Federal Farm Loan Bureau
 3) Section of Statistics
 4) Government Actuary.
2) Assistant Secretary in Charge of Fiscal Offices
 1) Treasurer of the United States
 2) Comptroller of the Currency
 3) Commissioner of the Public Debt.
 1. Division of Loans and Currency.
 2. Register of the Treasurer.
 3. Division of Public Debt Accounts and Audit.
 1. Division of Paper Custody
 4) Bureau of Engraving and Printing.
 5) Mint Bureau.
 6) Secret Service Division.
 7) Disbursing Clerk.
 8) Section of Surety Bonds of the Division of Appointments.
3) Assistant Secretary in Charge of Internal Revenue and Miscellaneous.
 1) Departmental Executive Offices.
 2) General Supply Committee.
 3) Bureau of Internal Revenue.
 4) Public Health Service.
 5) Supervising Architect's Office.
4) Assistant Secretary in Charge of Customs, Coast Guard, and Prohibition.
 1) Customs Service.
 2) Coast Guard.
 3) Prohibition Unit.
 1. Narcotics Section.
5) Bureau of the Budget.

Duties of the Secretary of War

1) To perform such duties as are imposed upon him by law, or entrusted to him by the President, in the administration of military matters and insular and waterway affairs
2) To determine the military and civil policies of the department
3) To promulgate rules and regulations respecting the administration of the army, the insular possessions, and the Panama Canal, the control of Federal waterways and civil works, and the use of military reservations.
4) To pass upon all matters referred by the Judge Advocate General to the Department of Justice
5) To approve all leases, bonds, and other similar documents
6) To recommend the appointment of presidential officers in the department, both civil and military, and to approve appointments under civil service rules and regulations.
7) To pass upon the work programs prepared by the chiefs of the several offices, services, and bureaus
8) To issue orders affecting the policies and programs of the different offices, services and bureaus, and to effect interbureau co-operation.
9) To appear before congressional committees on matters of appropriations and proposed legislation affecting the department.
10) Is a member, in various capacities, of several boards and commissions.

Departmental Divisions

The Secretary of War.
The Assistant Secretary.
Executive Offices.

1) The General Staff.
2) War Boards and Commissions.
3) Office of the Adjutant General.
4) Office of the Inspector General
5) Office of the Judge Advocate General
6) Office of the Quartermaster General
7) Office of the Chief of Finance
8) Office of the Surgeon General.
9) Office of the Chief of Ordnance.
10) Office of the Chief of Chemical Warfare Service.
11) Militia Bureau.
12) Bureau of Insular Affairs.
13) Office of the Chief of Chaplains.
14) Office of the Chief Signal Officer.
15) Office of the Chief of Air Service
16) Office of the Chief of Infantry
17) Office of the Chief of Cavalry
18) Office of the Chief of Field Artillery
19) Office of the Chief of Coast Artillery
20) Office of the Chief of Engineers.
 1) Board of Engineers of Rivers and Harbors.
 2) Harbor Line Board, New York City.
 3) Supervisor of New York Harbor.
 4) United States Engineer Offices.
 5) Lakes Survey.
 6) Mississippi River Commission.
 7) California Debris Commission.
 8) Board of Road Commissioners for Alaska.
21) Inland Waterways Corporation
22) Panama Canal.
23) Military Academy.
24) National Military Park Commissions.
25) Soldiers' Home.

Duties of the Attorney General

1) To render opinions on questions of law to the President and to heads of departments.
2) To direct the law officers of the Department of Justice in the conduct of government litigation.
3) To approve by written opinion the validity of title to public property.
4) To promulgate regulations formulated by prison boards to parole and rules governing United States prisons.
5) To act with the Secretary of the Interior in approving the adjudication of suspended entries of public lands and suspended preemption land claims
6) To approve all bonds, contracts leases, and other similar documents.
7) To recommend the appointment of presidential officers in the department, and to approve appointments under civil service rules and regulations.
8) To issue orders affecting the policies and programs of the different offices.
9) To appear before congressional committees on matters of appropriations and proposed legislation affecting the department.
10) Is a member, in various capacities, of several boards and commissions.

Departmental Divisions

The Attorney General.
Solicitor General.

1) Assistant to the Attorney General.
 1) Anti-Trust Division.
2) Assistant Attorney General.
 1) Division for the Defense of Suits'
3) Assistant Attorney General.
 1) Public Lands Division.
 1. Office of Titles.
 2. Office of Land Litigation in the District of Columbia.
4) Assistant Attorney General.
 1) Criminal Division.
5) Assistant Attorney General.
 1) Division of Admiralty, Finance, Foreign Relations, Territorial and Insular Affairs, and Miscellaneous Civil Matters.
6) Assistant Attorney General.
 1) Division of Taxation and Prohibition.
 2) Office of Superintendent of Prisons
7) Assistant Attorney General.
 1) Customs Division.
8) Assistant Attorney General.
 1) Executive Offices.
9) Solicitor for the Department of State.
10) Solicitor of the Treasury.
11) Solicitor of Internal Revenue.
12) Solicitor for the Interior Department.
13) Solicitor for the Department of Commerce.
14) Solicitor for the Department of Labor.
15) War Transactions Section.
16) Bureau of Investigation.
17) Office of Pardons.

Duties of the Postmaster General

1) To perform such duties as are imposed upon him by law, or entrusted to him by the President, in the administration of the Postal Service.
2) To negotiate postal treaties with foreign governments, subject to the approval of the President.
3) To promulgate rules and regulations respecting the administration of laws controlling the use of the United States mails.
4) To pass upon all matters referred by the Solicitor to the Department of Justice.
5) To approve all leases, bonds, contracts, and other similar documents.
6) To recommend the appointment of presidential officers in the department, and to approve appointments under civil service rules and regulations.
7) To issue orders affecting the policies and programs of the departmental and field offices.
8) To appear before congressional committees on matters of appropriations and proposed legislation affecting the department.
9) Is a member, in various capacities, of several boards and commissions.

Departmental Divisions

The Postmaster General.
Executive Offices.

1. First Assistant Postmaster General.
 1) Postmasters' Appointments Division.
 2) Post Office Service Division.
 3) Post Office Quarters Division.
 4) Dead Letter Division.
 5) Motor Vehicle Service Divisions.
2) Second Assistant Postmaster General
 1) Railway Mail Service Division.
 2) Railway Adjustment Division.
 3) Foreign Mails Division.
 4) Air Mail Service Division.
3) Third Assistant Postmaster General
 1) Money Orders Division.
 2) Postal Savings Division.
 3) Registered Mails Division.
 4) Stamp Division.
 5) Finance Division.
 6) Classification Division.
4) Fourth Assistant Postmaster General.
 1) Rural Mails Division.
 2) Topography Division
 3) Equipment and Supplies Division.
 4) Engineering Division.
5) Chief Inspector.
6) Purchasing Agent.
7) Office of the Comptroller.
8) Solicitor.

Duties of the Secretary of the Navy

1) To perform such duties as are imposed upon him by law, or entrusted to him by the President, in the administration of the Naval Establishment and insular affairs.
2) To determine the naval and civil policies of the department
3) To promulgate rules and regulations respecting the administration of the navy, the navy yards and naval stations, and the insular possessions, and the use of naval reservations.
4) To pass upon all matters referred by the Solicitor to the Department of Justice.
5) To approve all leases, bonds, contracts, and other similar documents.
6) To recommend the appointment of presidential officers in the department, both civil and military, and to approve appointments under civil service rules and regulations.
7) To pass upon the work programs prepared by chiefs of the several bureaus.
8) To issue orders affecting the policies and programs of the different bureaus and to affect interbureau co-operation.
9) To appear before congressional committees on matters of appropriations and proposed legislation affecting the department.
10) Is a member, in various capacities, of several boards and commissions.

Departmental Divisions

The Secretary of the Navy.
The Assistant Secretary.
Executive Offices.

1) Office of Naval Operations.
2) Navy Boards.
3) Bureau of Navigation.
 1) Hydrographic Office.
 2) Naval Observatory
 3) Naval Academy.
4) Bureau of Yards and Docks
5) Bureau of Ordnance.
6) Bureau of Construction and Repair
7) Bureau of Engineering.
8) Bureau of Aeronautics.
9) Bureau of Supplies and Accounts.
10) Bureau of Medicine and Surgery.
11) Headquarters, Marine Corps.
12) Judge Advocate General.
 1) Solicitor

Duties of the Secretary of the Interior

1) To perform such duties as are imposed upon him by law, or entrusted to him by the President, in the administration of home affairs.
2) To determine policies affecting the public domain and Indian and territorial affairs.
3) To promulgate rules and regulations respecting the administration of laws affecting public lands and pensions, and the management of national parks and other government reservations under the control of the department
4) To pass upon all matters referred by the Solicitor to the Department of Justice
5) To approve all leases, bonds and other similar documents
6) To recommend the appointment of presidential officers in the department, and to approve appointments under civil service rules and regulations
7) To pass upon the work programs prepared by the chiefs of the several offices, services, and bureaus.
8) To issue orders affecting the policies and programs of the different offices, services, and bureaus, and to effect interbureau co-operation.
9) To appear before congressional committees on matters of appropriations and proposed legislation affecting the department.
10) Is a member, in various capacities, of several boards and commissions.

Departmental Divisions

The Secretary of the Interior
Executive Offices

1) First Assistant Secretary
 1) General Land Office.
 2) Bureau of Reclamation.
 3) Mineral Leasing Division (Geological Survey).
2) Assistant Secretary.
 1) Geological Survey (except Mineral Leasing Division).
 2) Bureau of Indian Affairs.
 3) Bureau of Pensions.
 4) Bureau of Education.
 5) National Park Service
 6) St. Elizabeth's Hospital.
 7) Freedmen's Hospital.
 8) Howard University.
 9) Columbia Institution for the Deaf.
10) Administration of Alaska and Hawaii.
3) The Alaska Railroad

Duties of the Secretary of Agriculture

1) To perform such duties as are imposed upon him by law, or entrusted to him by the President, in the promotion of agriculture and the production and protection of animal life and health
2) To determine policies affecting the pres[illegible] and national resources and animal [illegible] matters as come under the jurisdiction of the department.
3) To promulgate rules and regulations respecting government reservations under the control of the department and those phases of interstate and foreign commerce which come under the jurisdiction of the department.
4) To pass upon all matters referred by the Solicitor to the Department of Justice.
5) To approve all leases, bonds, contracts, and other similar documents.
6) To recommend the appointment of presidential officers in the department, and to approve appointments under civil service rules and regulations.
7) To pass upon the work programs prepared by the chiefs of the several offices, services, and bureaus
8) To issue orders affecting the policies and programs of the different offices, services, and bureaus, and to effect interbureau co-operation.
9) To appear before congressional committees on matters of appropriations and proposed legislation affecting the department
10) Is a member, in various capacities, of several boards and commissions

Departmental Divisions

The Secretary of Agriculture.
The Assistant Secretary.
Executive Offices.
Director of Scientific Work.
Director of Regulatory Work.
Director of Extension Work.

1) Administration of Packers and Stockyards and Trading in Grain Futures.
2) Office of Experiment Stations
3) Extension Service.
4) Weather Bureau.
5) Bureau of Animal Industry
6) Bureau of Dairying.
7) Bureau of Plant Industry
8) Forest Service.
9) Bureau of Chemistry
10) Bureau of Soils
11) Bureau of Entomology
12) Bureau of Biological Survey
13) Bureau of Public Roads.
14) Bureau of Agricultural Economics
15) Bureau of Home Economics
16) Insecticide and Fungicide Board.
17) Federal Horticultural Board.
18) Solicitor.

Duties of the Secretary of Commerce

1) To perform such duties as are imposed upon him by law, or entrusted to him by the President, in the promotion of commerce and industry and the protection and regulation of navigation.
2) To determine policies affecting the collection and allocation of subsidies, the establishment of aids to, and regulation of shipping, and the standardization of manufactured products
3) To promulgate rules and regulations respecting the ceding of excesses, the protection of the fisheries, the administration of the navigation laws and the laws affecting patents and the use of government [illegible] under the control of the department.
4) To pass upon all matters referred by the Solicitor to the Department of Justice
5) To approve all leases, bonds, contracts, and other similar documents
6) To recommend the appointment of presidential officers in the department and to approve appointments under civil service rules and regulations
7) To pass upon the work programs prepared by the chiefs of the several offices, services, and bureaus.
8) To issue orders affecting the policies and programs of the different offices, services, and bureaus, and to effect interbureau co-operation.
9) To appear before congressional committees on matters of appropriations and proposed legislation affecting the department
10) Is a member in various capacities, of several boards and commissions

Departmental Divisions

The Secretary of Commerce.
The Assistant Secretary.
Executive Offices.

1) Bureau of the Census
2) Bureau of Foreign and Domestic Commerce
3) Bureau of Standards
4) Bureau of Fisheries
5) Bureau of Lighthouses
6) Coast and Geodetic Survey
7) Bureau of Navigation
8) Steamboat Inspection Service
9) Patent Office.
10) Bureau of Mines
 1) Government Fuel Yards
11) United States Section, Inter American High Commission

Duties of the Secretary of Labor

1) To pass upon all matters imposed upon him by law, or entrusted to him by the President, in the promotion and advancement of employment [illegible] and the welfare of wage earners, improvement of their working conditions and [illegible] of immigration and naturalization
2) To determine policies affecting the settlement of labor disputes and the advancement of employment [illegible] for employment [illegible] and [illegible] of [illegible]
3) To promulgate rules and regulations relating to the entry of aliens into the United States, and their naturalization laws, and the use of government reservations under the control of the department
4) To pass upon all matters referred by the Solicitor to the Department of Justice
5) To approve all leases, bonds, contracts, and other similar documents
6) To recommend the appointment of presidential officers in the department and to approve appointments under civil service rules and regulations
7) To pass upon the work programs prepared by the chiefs of the several offices, services, and bureaus
8) To issue orders affecting the policies and programs of the different offices, services, and bureaus and to effect interbureau co-operation
9) To appear before congressional committees on matters of appropriations and proposed legislation affecting the department
10) Is a member in various capacities, of several boards and commissions

Departmental Divisions

The Secretary of Labor
The Assistant Secretary.
The Second Assistant Secretary
Executive Offices.

1) Bureau of Labor Statistics
2) Bureau of Immigration
3) Children's Bureau
4) Bureau of Naturalization
5) Women's Bureau.
6) Division of Conciliation.
7) Employment Service.
8) Housing Corporation

have also been pointed out. These relations are to a certain extent political in nature. The purely administrative work of these departments interests us here.

In the chart adjoining this page, there is shown a conspectus of the powers and duties of the leading executive officers, and of the organization of the executive departments. Each department is given a head who is called a Secretary, with the exception of the Attorney-General and the Postmaster-General. Representing the President, they have the power of appointing or recommending the appointment of a number of subordinate officials. They have certain ordinance powers, in that they must issue ordinances for the government of their departments. In some cases the Secretaries may finally determine cases appealed from the decisions of subordinate administrative officials. The position of the Secretary as adviser of the President with respect to policy, and his relations with the Senate and House of Representatives with respect to appointments, are political functions not entirely connected with the business of administration. The professional spirit of business in the departments, based upon the principles of efficiency and economy, is retarded by such political interruptions, but on the whole the spirit is manifest. With such men as Charles E. Hughes as Secretary of State, and Herbert Hoover as Secretary of Commerce, the business of government as regards organization and personnel has steadily improved. The heads of the departments have associated with them one or more assistant secretaries who have political and administrative functions. The numerous bureaus or divisions are presided over by chiefs, directors, or commissioners, and to each department is assigned a Chief Clerk who has charge of the subordinate employees.

The extension of the merit system to subordinate employees and officials was made through the establishment of the Civil Service Commission. The work of this commission has not been altogether free from difficulty, but there has been a steady improvement in its administration of the personnel work of the government. Movements in the direction of efficiency and economy have not been limited to the Civil Service Commission. The reorganization of our administrative departments with a view to a better rendition of government services has long been discussed. The first step in this direction was taken by President Theodore Roosevelt, who appointed a commission to study the extension of business methods to government. In 1910 Congress made an appropriation for the investigation of this subject. President Taft appointed a Commission on Economy and Efficiency which, under

the chairmanship of Frederick A. Cleveland, rendered a comprehensive report on the administrative machinery of our government, including the problems of a national budget, of organization, of personnel, of financial procedure, and of business practice and procedure. During the World War many bureaus and commissions were established to deal with the greatly increased work of the government. These additional bureaus, springing up over night, as it were, could not take account of the most economical measures, in view of the fact that economy might mean such delay as would lose the war. These bureaus were gradually retired after the establishment of peace, and the next positive step was taken by the Harding administration. A committee of seven members, representing the executive and the two houses of Congress, was appointed to study the question. Administrative approval was secured for certain reforms, such as the creation of a Department of Education and Welfare; the combination of the Army and Navy Departments into a single Department of National Defense; the parcelling out of the independent agencies of government among the regular departments; and a reclassification of many of the bureaus with a view to a more ordered arrangement as to function and efficiency. Certain of these proposals were embodied in a reorganization bill and presented by Senator Smoot on June 3, 1924. The provisions of this measure would make possible a more logical arrangement of many of the administrative bureaus, and a classification as regards function, which, under the present plan, is in some cases almost totally lacking. An interesting provision was the authorization of cabinet officers to re-organize the departments under the direction of the President. The bill failed, due to the adjournment of Congress. The Republican platform of 1924 declared, "We favor a comprehensive re-organization of the executive departments and bureaus along the line of the plan recently submitted by a joint committee of the Congress which has the unqualified support of President Coolidge." The plan was reintroduced in the Congresses which followed, but no action has so far been taken. On December 8, 1925, Senator Edge of New Jersey introduced a bill which would authorize the President to re-organize the executive departments, and to transfer bureaus from one department to another. On February 8, 1926, Representative James introduced a bill which would combine the Army and Navy Departments into a single "Department of National Defense." Administrative reorganization has received much attention in party conventions and platforms, in the legislative committees,

and even on the floors of both houses; but it remains an ideal awaiting realization.

II. The Business of the States

Inadequacies of the State Administrative System.—There is today a widespread movement in the direction of efficiency and economy in the administration of state governments; and there is also, more than ever before, a realization that running the government of a state is, after all, a business, and a very important one. Business principles, therefore, insofar as they apply to government, are sought earnestly by the executive, the legislature, and the electorate. What are the causes lying behind this realization of the existing inadequacies of our state machinery? If the causes can be discovered, what are the remedies to be applied? These are questions which only the proper authorities can deal with effectively. Any discussion of the business of state government must deal with this phase of the question.

One of the defects of our state systems may be set forth by comparing them with the federal system. Administration in the United States, as we have seen, is under the control of the President, a single executive. It represents the highest degree of concentration of authority and responsibility. Whatever difficulties the President may have with the legislature and the courts, he has an independent position as regards his subordinates, and does not face the problem of a divided executive control, shared by different officials and agencies deriving their powers from different sources. This system was followed under the colonial governments. The governor enjoyed much of the prerogative of the crown, and indeed had the function essential to all effective state administration—that of appointment and removal. The executive post which the makers of the Federal Constitution copied after a fashion was the very thing the state governments sought to avoid. A divorcement of the powers of the governor, and their transfer to the legislature of the state, was in keeping with the great democratic movement. Indeed, they were to suffer from an "excess of democracy," a condition from which Hamilton sought to save the national government. Some of the powers were given to the people rather than to the legislature. The principle of election was applied to the more important administrative offices. Some of the executive functions were given over to officials or boards chosen by the legislature, and, in some cases, by the governor. The appointing and removing power is there-

fore divided. The administrative function, which requires a head and a concentration for efficient operation, was distributed in an irresponsible way. Each official and board enjoyed a certain independence, and there was little or no control over them. It was the old story of authority without responsibility. Thus the governor is not the head of the administration of the state. His extra-legal position may make him so, but he does not attain this status under the constitution and laws of his commonwealth. The officials elected by the people, receiving the same sanction as the governor, cannot be removed or controlled by him. In some cases he has the power to remove them for cause, but the case against them must be clear, and the governor might have more to lose than to gain by such procedure. Their very independence places them in an invulnerable position. They may use their offices to embarrass the administration of the state's business, and yet may easily escape answering for such embarrassment. Sometimes an entire legislative and administrative program has been blocked as a result of their influence. In some instances they have used their offices to make war on the administration of a chief executive, and to discredit a governor's administration, with the clear intent of placing themselves in the higher post. In such a campaign they have possession of state secrets and confidential information which may be turned to political account. The governor cannot control or direct them. They are secure in their election by the people, to whom alone they are responsible. The electorate is slow to act, and is likely to blame the governor, who is more responsible, if things do not go well. It is only in the American state governments that an executive office can be used for an extended period as a political weapon against the leading executive, for the purpose of ousting him. Such opportunity for undermining the executive's influence and efficiency makes impossible an effective functioning of executive power. The states, upon making their first constitutions, were not satisfied merely to restrain the governor from the exercise of legislative and judicial powers through a system of checks and balances based upon a separation of powers; they bound and gagged him by an unscientific division of authority and responsibility. The desire was to render him harmless. The result was mal-administration, and a virtually functionless state machinery.

Having thus begun, the states could not go backward. Powerful and centralized executive authority was a bad thing; so the principle of decentralization had to continue. Indeed, the early arrangements were not so adequate as those of today, for the demands of the people

were much simpler. In many sections the theory prevailed that only such government and regulation should exist as was absolutely necessary. The states had but few functions, and these were comparatively simple. Taxes had to be laid and collected. It was necessary to keep order and to guard against invasion, and to this end a militia was maintained. The enforcement of the law was necessary. Police officers and a system of courts performed this duty quite well. The citizen did not come into contact with his state government then as he does now. The state did not do so much for him. It interfered less in his own affairs. He was left to choose his own devices, short of a violation of the laws, in his efforts to earn a living. In return, he did less for the state. He paid less taxes, and expected less in the way of public services. But the population grew, both through immigration and through natural increase, and more people required more officers of administration. This meant higher taxes, more officials, courts, and administrative agencies. Then, too, the conception of the function of the state has undergone radical alterations. Jefferson believed that government to be best which governed least. He also believed in the efficacy of the state governments, although some of his acts as President are not consistent with this view. It was natural that the people should restrict their state activities to rather narrow bounds. But new needs were created, and were not satisfied. As the change in the function of the government became formidable, the legislatures were pressed for remedies. At first there was no suitable remedy. The state must, the people declared, furnish certain services to the people of the state. Where positive contributions were agreed upon, the machinery had to be provided for them. Then the idea prevailed that the government should more and more assume the position, not only of referee, but of director, counselor, and even guide, in business and commercial development. Combinations of capital and business were subjected to state control. Public utilities, and especially the public service corporations, affecting vitally the economic welfare of the entire population, were put under the control of boards and commissions. The state was regarded as an instrument for the betterment of the social conditions of mankind. Much welfare legislation was passed in relation to women and children in industry, to hours and wages of labor, and to other social matters, which varied according to the locality. In some instances the power of the state was extended to moral welfare.

How were the increased needs of the people to be met? How could the increased services of the state be performed? The principle of

regulation was almost universally adopted by the states. The regulatory function became the most important one. There was no machinery to handle the situation. Concentration was needed more than ever; but it was pushed aside, and decentralization became even more the order of the day. An office would be created, a commission established, a board authorized, with independent powers and functions, in addition to the already too numerous irresponsible agencies of state government. There was no motive, no plan, no order by which the energies of the state could be directed. Duplication was inevitable. Only conflicts in administration could result, with the consequent delay and division of counsels. It is little wonder that one writer describes it as a "disconnected, ramshackle, chaotic affair resembling nothing so much as the old-fashioned jig-saw puzzle." The indictment, while severe, is true.

It is not primary need (a changed conception of the function of the state) and the regulatory element alone which operate to multiply the administrative agencies of the state. In the business of government there is unfortunately no way to make the responsible persons suffer for unnecessary and unwise expenditures. A business must pay interest, and a corporation must pay dividends, else they will go to the wall. The constant effort in business is to cut down as much as possible the overhead expenses, unless additional expenses, over and above the necessary amount, will bring in new business. It is not the function of the state to make money. It has certain primary interests to safeguard, and these must receive the necessary attention. The health, safety, morals, education, and welfare of the people must be fostered. The fact of expenditure in these cases is not a question; only the amount and degree of expenditure must be settled. On the other hand, there are persons who would multiply the state agencies merely because it is the fashion to do so. The state, they say, can stand an additional overhead expense, no matter how unnecessary; a little more expense added to the tax-payer's burden will not be felt by any one in particular. No one can be held responsible for it, and it means some new jobs. It is a means of tapping a pipe-line to the public treasury. Retrenchment may be suggested by the people, and organizations may urge tax reduction; but every office-holder and every commission stands pat on the question of trimming down the payroll. More patronage, more power, and more money, rather than less, is wanted. To keep the peace it must be passed around, and all join hands to prevent any effective reorganization or retrenchment. The people pay the bills. But that

does not affect the politician; he takes delight in it; to him, that is what the people are for anyhow. The state government was made for his special needs. It is for him to exploit, to use, and to bleed.

But what of business in government? The practice of adding so many units of administration, without design, plan, or purpose, has been carried on long enough to allow a judgment of its results. Inevitably it is uneconomical. Duplication of functions and decentralization of control proves that. It is inefficient. Without a head, there is little response to popular need. Under the federal system the different units are so geared, related, and controlled that all parts of the great organic whole respond with a certain readiness to the direction from above. But the state government is irresponsible. The units may work at cross purposes, and may embarrass such responsible officials as the state has, without facing the consequences of a mistaken and unwise interference. Worst of all, the system works to the advantage of the spoilsman, who, through the state and its business organization, seeks only his own betterment.

Elective Administrative Officials of the State.—All of the states have a number of administrative officials, independent of the Governor, and elected either by the people or by the state legislature. In most cases the principle of popular election prevails. The office of Lieutenant-Governor is provided for in most of the state constitutions. This official presides over the upper house of the state legislature. Like the Vice-President of the United States, he may vote in case of a tie. Should the Governor vacate the office for any reason, the Lieutenant-Governor is next in line of succession. No state has omitted the office of Secretary of State. In a word, he is the state archivist. He must publish and distribute the laws of the state, and he has general control over the routine matters connected with the state elections, such as the issuing of notices, and the compiling and recording of the returns. He keeps the great seal of the state, administers the oath of office to state officials, and incorporates business associations under the state laws. In some states he is required to report directly to the state legislature. Many other duties are assigned to him which do not lend themselves to classification. The state Treasurer is elected, except in a few cases, by the people. As his title designates, he has in his charge the state revenues, from whatever source derived. He is also the state disbursing officer, and as such pays out money as authorized by the legislature. A Comptroller or Auditor is included in most of the state systems. All state accounts are audited by him. Claims against the treasury are examined and approved by him, and

his authorization is necessary to their discharge by the state. In some of the states he may inspect the local accounts of the county treasurers. The Attorney-General is the head of the Department of Justice. He is the law officer of all of the state departments and divisions. He advises them with respect to questions of law, and appears in court in all cases to which the state is a party. He has much discretion in determining the degree of law enforcement. It is his business to prosecute persons who impede or violate the laws which are to be enforced by the Governor or other officials of the state.

Boards and Commissions.—The new services of the state were provided for, in the main, through the establishment of commissions, boards, or offices, with their own responsibilities and independence. The older offices and departments were not enlarged. The least new function dictated a new state agency, with the result that in some of the states upwards of a hundred of these units of administration are to be found. A function committed to a single official in one state may devolve upon a board in another. On the whole, boards and commissions have led in the more recent accretions to state government. In nearly every state the public utilities are subject to regulation. A board or commission is charged with the business of enforcing the laws. The function may extend to rate-fixing. They are sometimes called railroad commissions, public service commissions, or public utility commissions. Railroads, electric power companies, telephone companies, light and heat corporations, and water companies come within this category. The state tax commissions are appointed to assess state and local taxes, and often to collect special kinds of taxes and revenues. The construction of highways, an important and expensive function, is vested in the State Highway Commission. Banks and insurance companies have come within the regulatory power of the state. The administration of the laws concerning these institutions is given over to officials, generally called Commissioners. Such measures are for the protection of the investing public.

Labor and industry are regulated by a variety of boards. Industrial Accident Commissions, Minimum Wage Commissions, and the Commissioner of Labor share these functions. Some of the laws of this class are intended to prevent abuses, such as the wage laws, the hours of labor laws, laws for women and children in industry, the settlement of labor disputes, and better conditions for labor generally. Others provide positive benefits, such as the workmen's compensation acts. The protection of the public health is vested in a Board of Public Health. It has important police powers, and may enforce quaran-

tine regulations, abate nuisances, and provide for the health of the people of the state generally. Vital statistics are under the control of this board. The poor and the unfortunate are under the care of the state Board of Charities and Corrections, which is concerned with poverty relief as befits the individual cases; and it also administers the institutions to which the unfortunate, such as the dumb, deaf, blind, and insane, are committed. Public education is the function of the state governments in a special sense. A state department of education is under the control of a Superintendent of Education or Public Instruction. With him a Board of Education is sometimes associated, to which he is responsible for the formulation of policies and the administration of educational affairs. In each state there are several Boards of Examiners to pass upon the admission of candidates to the several professions. This is specially true of the professions of the law, dentistry, and medicine, although other professions, occupations, and trades are included. The financial administration of the state is often vested in a Board of Control, which examines and approves for the Governor the items in the budgets of the various departments, offices, boards, or commissions. Other offices include the State Engineer, the State Architect, and the Forest, Fish and Game, and Agricultural Boards or Commissioners. Some states have Historical Commissions, and State Historians. There are other offices too numerous to list here.

These state agencies have some common elements, but classification of them is difficult. We have already classified them as regards function. What about organization? The analysis of Professor Holcombe in his *State Government in the United States* cannot be improved. They may be reduced to four main types: a department with one head, appointed by the Chief Executive with the consent of the Senate; one head chosen by a board or commission, which in turn is chosen by the executive, the legislature, or the electorate; an unpaid lay board which assumes much authority, and is aided by some expert secretary; and the paid board or commission which is given important and technical services to perform. Within these classes practically all of the new state agencies fall. They perform a multiplicity of functions, and exercise all kinds of authority in spite of our principle of the separation of powers. Their jurisdiction is justified on the ground of their special character.

The Movement toward Reorganization.—Reorganize! Reconstruct! Professors of political science and economics, politicians and political hangers-on, spoilsmen, administrators, civic-minded citizens, legisla-

tors, and governors, all are joining in the cry. The need is great; but only time can discover whether the movement will be anything more than an outcry. The illogical arrangements of our state administrative systems cannot last. Unless something is done the state will crash under the weight of it, and nothing will be left but the debris. The politician approves reorganization along the lines of his own interest. It is popular to join in the cry. What is the answer? Many good men and true have it in mind, if the people would only take heed. The first important step is to concentrate responsibility in the Governor. Why should he not be the head of the state, as the President of the United States is the head of the nation? The second step is to cut down the inordinate number of offices, boards, and commissions which now clog the state administrative machinery. The initial stages of the reform movement have taken the form, in a number of the states, of Commissions of Efficiency and Economy. The committees have been constituted in different ways. The best reports have come from those which have arranged for the collaboration of disinterested experts who are able to give detached counsel, uninfluenced by local political considerations.

The records of commissions are often of little value. Their recommendations may be unsound, or their reports may be badly drafted. The purpose of the commission may be only a gesture to satisfy an aroused public, with the thought that the issue may possibly be retired from public discussion and agitation. Some of the states have taken definite action. In 1917 Governor Lowden and the Illinois legislature passed legislation which wiped out more than a hundred state agencies, and vested the control in nine departments under executive authority. The heads of these departments are appointed by the Governor with the consent of the state senate, and may be removed by him. The traditional elective officers are unaffected by this legislation, as they are protected by the state constitution. The efficiency movement will not be complete until the principle of appointment and concentration of authority is applied to these elective positions. Those who stand to profit most by the elective principle will oppose the change to the last. A dozen or so other states, including Idaho, Nebraska, Massachusetts, California, Utah, Michigan, Maryland, Pennsylvania, Vermont, Tennessee, and Washington, have taken forward steps in the direction of reforming their administrative agencies. Other states will likely follow, with reforms suited to their own needs. A model state organization is proposed by the National Municipal League, in a pamphlet entitled a *Model State Constitution*. It remains, however, an ideal

awaiting realization. The executive, a governor, is to be elected for a period of four years. He has the full power of appointment and removal. A unicameral legislature is to be elected every two years by proportional representation. Executive and legislative contact is made possible through a provision which allows the governor and heads of departments to sit in the legislature, and to debate and introduce bills, without having the right to vote. Such proposals will not enjoy a wholesale adoption. But they manifest a healthy tendency toward which all governments should strive in the effort to improve their offering of service to their citizens. Reform of the administrative agencies is not enough. Still more important is the political education of the people. Their political behavior and judgment will not be far in advance of their political knowledge. In this field, as in all others, knowledge is power.

III. Municipal Business

Municipal administration is essentially municipal business. It is true that the aims of business and government, like the aims of business and religion, are very different; but the methods should not be strikingly dissimilar. The aims of the church are to spread its faith and doctrine, and to lift the moral and spiritual tone of the community. These aims are higher than those of business; but assuredly their realization will be the more effective and far-reaching if the organization and administration of the church activities are efficient. So it is with government. Its aim is to make the coöperative life of the people happier, better, and more efficient. This is higher than the purposes of business, which are to make profits. But the aim of government is not surely attained, if its organization is topheavy and creaky, its administration slovenly, and its personnel untrained. The business of the city must consider conditions as they are, and these conditions are social, economic, and political. The political element in the city is stressed to an extent far out of proportion to its importance. There are no great issues, as in international relations, the state, and the nation. It is of much greater consequence that the conditions of life be made better by the city than that political organizations exist for the discussion of policies. Polarization of thought should take place at election time, but it need not be continued throughout a city administration, unless an emergency requires it. It is the business of the city to render certain services, individual and neighborhood, to its citizens and residents. By this it is judged. The administrators of the

cities will not, by reason of this experience, become political philosophers. The range is too limited, and the vision too narrow. This is inevitable in the nature of municipal services. Their best claim to distinction is the recognition that, while the city's aims are social, its methods should be businesslike.

Forms of Organization.—The typical city organization of the old type was made up of a large city council, sometimes of two chambers, elected by wards, with the usual ordinance powers; a mayor elected by the people, with the power of veto and a limited power of appointment; some elective heads of departments; and a number of elective and appointive boards. This form had many variations, but these are the essential elements. In the more recent mayoralty plan the mayor is essentially the chief executive with the power of appointment and removal, and the right to draw up the annual budget. The council is a small body, and has essentially legislative duties. The line between the executive and legislative powers is sharply drawn. In the commission plan we find a complete union rather than a separation of legislative and executive powers. A council of five or seven members legislates collectively, while each member administers a department individually. As in the case of the British cabinet, there is a joint and individual responsibility. The mayor is an official of little power. In the city-manager plan we find the most complete unification of powers. All powers are vested in one council. Functions, however, are divided. It is the business of the council to restrict its work to legislation and supervision, while the business of the city is delegated to a manager appointed by the council, and to expert heads of departments appointed by himself. While he is in power his authority is virtually absolute. He is completely responsible to the council, and may be removed at any time. These forms, as briefly described, are the means through which the aims of the city are realized. They are not all adapted to all cities. An excellent form may be ruined by poor administration; on the other hand, a good administration of a poor form may work fairly well. The business of the city will be facilitated, however, if a plan is adopted which makes possible the application of business methods to its government.

Municipal Functions and Administrative Divisions.—Every administrative unit or division worthy of the name serves some definite function or need. The increase of city populations and the growing complexities of city life are somewhat analogous to the development of the states. New conditions required new functions of the city. Like the state governments, the city governments, instead of taking stock

of their existing organization, started a process of adding an office, bureau, or department to the existing municipal machinery, with little heed to the problems of duplication, concentration of power, coördination, or responsibility. While we justly condemn the tendency, it is a manifestation of a human law to conserve what we have, and to improve it from time to time. A process of re-building is regarded as costly and even dangerous; but we fail to realize that repairs and additions at the top of our city structure cannot be made indefinitely unless we strengthen, alter, or even remove the old foundations. The new forms of city government which have developed within comparatively recent years are earnest attempts to satisfy the yearnings of our cities for release from the conditions of the past. Experimentation in municipal business, if honestly tried, in spite of occasional disappointment should yield results comparable with the principles of business, which today, after much trial and effort, are fairly definite and conclusive.

Of the many functions of the city perhaps the foremost is that of insuring the safety of its citizens and residents. This is the first business of any national, state, or local government. Indeed, national governments which do not provide safety for their citizens and resident aliens have been declared by our Department of State not to be "worthy of the name." The function becomes the more acute and important as the lower levels of government divisions are approached. The least the city can do is to secure the ordinary citizen against crime; yet the city does not do this. The indictment against the modern American city on account of the frequent robberies, burglaries, and murders is made from all quarters, and is admitted by many municipal authorities. The usual answer is that the enforcement of the law is as effective as the resources of the city government and the desires of the people will permit. It is still one of the riddles of politics that a majority of the people, either directly or through their representatives, join in the enactment of laws which they intend shall be enforced, and that a minority can virtually prevent appropriate enforcement, or neutralize its effect. The dangers to the persons and property of citizens and *bona fide* residents in our cities cannot be overestimated. The business of the police department is to prevent this sort of thing, or at least reduce it as much as possible. It is suggested that modern criminal procedure is such a paying thing, and its methods are so advanced, that the police departments, and the science of police administration, have not been able to keep pace with them. If this is true, the cities must either develop better police meth-

ods, or look to the people to take the matter of security to persons and property into their own hands. Most people who have property which is susceptible of theft cover it with burglary insurance. Rates on this form of insurance have increased, owing to the failure of the city to cope with the situation, and to the increasing risks. The obvious answer seems to be that the cities must go into the business of studying criminology as a science. Some progress has been made in this direction. August L. Vollmer, Chief of Police of Berkeley, California, has established a police school, and has given much of his time to the development of police methods as a science. Professor Alexander M. Kidd of Columbia University has been at work on the interesting problem of relating criminal law to the new science of criminology. It is his belief, not only that our young lawyers should have a knowledge of the statutes and cases dealing with crimes, and of criminal procedure, but that the problem of crime should be approached from both a technical and a social standpoint. Further progress in this direction could be noted. The problem of personnel is an important one. The police department is no better than the men of the line who are on active duty, no matter how efficient the staff officers may be. Schools for police officers are being created. Efficiency ratings have been made in most cities, and police service as a profession has been made much more attractive. Moreover, the salaries of policemen are in some places being raised to the point where the men can live with decency and support their families adequately. The incentive to profit by suppressing criminal knowledge or by extending illegal protection for a sum of money will be less likely to tempt a man who is well treated and who has a pride in maintaining the ethics of his profession. Better men will be attracted to the posts to displace those who would yield, or who are unworthy of the increased compensation and responsibility.

The business of the police department extends to many other functions. Much of its work is the protection of the people, especially children, from accidents. Sometimes the policemen are directed to aid the children in certain parts of cities in their play. They must supervise the public meetings which assemble in the name of the right of public assembly. Such assembling must be for a lawful purpose, and must be orderly. The work of the police department is taxed to the utmost when strikes occur. They may not be serious; and yet they may completely derange the life of the city. The department cannot afford to take sides in industrial controversies; its duty is to maintain the public peace and to protect life and property. If institutions of labor

or capital are involved in the performance of this duty, the aim of the department is the same.

The regulation of traffic in cities is one of the most pressing problems of city life. It has been committed to the police department. Much effort which might be directed to the repression of crime now goes into traffic regulation. The authority of a uniformed policeman makes an impression on the speeding automobilist, the man who "cuts corners," or who ignores the "stop" and "go" signals. This has developed into a separate municipal science which has little in common with the ordinary duties of police administration, and which has been committed to the police because it has become the fashion to do so. Professor Miller McClintock, of the Erskine Bureau for Traffic Research, recently established at Harvard University, has applied scientific method to the control of traffic in metropolitan areas. Traffic control, according to Dr. McClintock, is a phase of municipal engineering, and should be studied as such. In his admirable volume, *Street Traffic Control,* he has for the first time set forth the principles which should obtain in this vexatious city problem. Millions of people everywhere are his debtors. His principles, where applied, have substantially reduced accidents, speeded up traffic, regulated it better than before, and simplified the traffic codes of cities to a point where the average motorist may master their provisions with little effort. Traffic control is not a punitive matter, but one of education and regulation. Special police squadrons organized for this purpose alone, or a separate department of the city government, may be necessary for this important function.

A part of the city's safety lies in protection from fire. Fires are due to accident, arson, or incendiarism. The duty of the city is to spread a knowledge of the elements of fire prevention, and to maintain forces for the combatting of fires which get under way. A definite routine of promotion is usually maintained for members of the fire departments. It is one of the least spectacular departments of the city, except on the occasion of a fire, and yet one of the most important. A well regulated department often prevents a small fire from becoming a general conflagration. Fire is one of mankind's greatest blessings, but when not under control it is the greatest curse. We must protect ourselves against our own carelessness.

The maintenance of public order and safety is not the only function of the city. An increasing number of public improvements must be added to the city from time to time. Parks must be laid out, and streets and sidewalks must be made, improved, and maintained. Often

the city has gone into business. Utilities have been established for the collective benefit of the people. These include gas and electric establishments for light, heat, and power, the city waterworks, the operation of the city railways, sewers, and, in port cities, the construction of docks and water terminals. Certain of these municipal services are traditional, and are taken for granted by the residents of the city. Not to provide them, or to fail in their provision, would cause a panic. Other services are not traditional but special, and hence require special provision for their establishment and administration. The officials, boards, and commissions having charge of these services, ordinary and special, have different designations, organizations, and powers, and therefore defy classification. It would be idle to name them here. The public works of the city, its buildings and utilities, its parks and playgrounds, all may be included under the general heading of municipal improvements.

The regulation of public utilities is a problem with which every city is confronted. Where the city owns the utility, the problem is comparatively simple; where the major utilities are privately owned, there is the problem of regulation, which is not precisely an administrative problem. Where privately and publicly owned utilities compete within the same city, the problem becomes acute. The deadlock is usually settled by the retirement of one of the contenders from the field, as continued competition is not only ruinous to the contending businesses, but also expensive for the consumers. It is a problem of policy rather than of administration, and can be solved only through experience. The major public good is the thing to be sought. Perhaps each community must experiment for itself until definite conclusions can be drawn.

The public health of the city deserves the most careful protection. Prevention as well as cure must be sought here. An epidemic or plague may work more havoc than a general conflagration. The city's responsibility extends to the people in general, to the schools, and to any situation where the health of the public may be impaired. Special institutions have been established to deal with special forms of disease. Clinics for various afflictions have steadily reduced dangers to the health of the people. Inspection of foodstuffs is enforced with a view to preventing disease. Certain establishments for the aid of those who cannot afford professional medical attention are provided in many cities. Every city of any consequence maintains a receiving hospital, and many municipalities have established them for the further treatment of accident or disease. Much attention is given to child hy-

giene. We now realize that a little attention during the early stages of life will prevent subsequent physical weaknesses. The present generation of youth will benefit by this arrangement. It is surprising that mankind did not realize its duty to the child earlier. It is now definitely accepted that the health of the child is the concern of the community. The profession of public health, which is quite different from that of the practice of medicine or the healing arts in their various branches, has become definitely established.

The city must also minister to the social needs of its citizens, in addition to the basic city activities. The poor and the unfortunate have become objects of the city's solicitude. Institutions for the aged, the infirm, the orphans, and the homeless are established in many cities. Efforts are made to provide playgrounds for the children of the city, and to give them vacations during the oppressive summer months. Summer camps are maintained by the cities in spots suitable for vacation purposes. The social effort is in the first place remedial; it seeks to prevent a moral deterioration which may befall men or women when they are penniless, or otherwise "down and out." Such people are costly to the city, and in due course may become a part of its underworld. In the second place, its social effort is not designed to be of permanent aid to men and women who have the physical and mental capacity to "get on their own feet." They may "lean to" for a time, but only with a view to "standing alone" when they can do so. Otherwise the idea would prevail that the city owes its residents a living, and social expenditures would in time bankrupt the municipality. The social effort which leads to expenditures and outlays for maintenance must be watched, and applied only in the worthy cases.

Of primary importance is the educational system of the city. In the main it has been divorced from politics. Matters of policy are determined by a board of trustees or of education, which has no connection with the city council. Financial matters are also within its control. It may call for the voting of bonds for school improvements, and may authorize the expenditure of any tax or special funds properly committed to its care. The administrative function of the city educational system is in the hands of a superintendent of schools, who is responsible to the board of education. The public school system is the pride of the city. More and more the child is coming under the care of the state, insofar as education and health are concerned. The home is not being destroyed, but its former exclusive functions are steadily being invaded. Night schools are maintained in order that adults may secure an education or training which was perhaps denied

them during their younger days. The independence of the school system has been its greatest strength. Even under these circumstances, however, bargaining for positions in the schools and for the contracts growing out of public school improvements is far too prevalent for the public good. But it has been reduced to the smallest minimum in the administration of our schools. Other public administrative systems might well borrow a leaf from their book.

Most of the cities maintain public libraries. These are centers of education, unsupervised and voluntary, from the standpoint of the seeker for knowledge; they are also becoming centers for the adult education movement in the United States. Some of the great municipal libraries cannot be excelled from the standpoint of their materials and services. Indeed, in some large cities professors and scholars carry on their researches in the city libraries rather than in the university libraries. The head of the library is a trained expert, who is responsible to the library board of the city.

A new phase of city activity has recently developed. City planning has become something of a profession. The old method of laying out a city by accident has given way to one by design. As the city increases in population, its growth in new and different directions will be regulated, with a view to beauty, symmetry, and economy. Streets in residential districts need not be so wide as the main business thoroughfares, or the boulevards of traffic. These matters will be regulated. In other words, the city will be planned. Buildings will be restricted as to foundations, height, and even style. Building zones, business, industrial, and residential, are being established, within which certain building regulations may be rapidly enforced. The principle has been accepted by many cities. But it is not merely a matter of planning and administration; it is a great social problem calling for patience, tact, and courage. The engineer cannot act alone; he must have the organized support of the people behind him. When a city planning scheme affects the pocketbook of a resident, it becomes to him a confiscatory process which he fights to the limit of his capacity. He has rights to the extent of his financial damage. He also has a duty to society, of which he cannot be the judge. A generation hence, our plans for our cities may result in an entire change in the appearance of our cities.

There remains the financial end of city administration. It is important. Municipal services and activities must be paid for. Society's largest bill is for its protection against itself. Little is left for the more positive services. The money must be had; yet the expenditures must be kept down in order that the burden of taxation may not be too

great. It may become heavier than business, industry, and the professions can bear, and then our entire municipal structure will collapse. The business of the city cannot increase much more on the side of expenditures unless it can make some revenue for itself. Socialization is not yet seriously contemplated by the American people. It is a principle which is foreign to our traditions and practices. Taxation must therefore be regulated with the earning capacity of the people definitely in mind. The property tax, personal and real, is the greatest source of revenue. It is levied by the city, and apportioned by the assessors. One may appeal his tax bill; but he dare not neglect it, else his property will be sold. The citizen and property-owner must meet the demands of the state, for otherwise he will suffer, from a property standpoint. But the citizen has no guaranteed security against the things from which the city is supposed to protect him. Other sources of revenue may be tapped in the form of licenses, fees, and special assessments, but the bulk of the expenditure is met from general taxation. Taxation in cities is often regulated to a considerable extent by the state constitution and laws. Taxes increase as the business of the city expands. Does the tax-payer receive an increasing amount of security, protection, and happiness from this increased expenditure? The answer is left to the citizen himself.

READING NOTES

The Nation's Business

The general works on national administration are: Fairlie, *The National Administration of the United States;* Short, *The Development of National Administrative Organization in the United States;* and Willoughby, *The Reorganization of the Administrative Branch of the National Government.*

The President's cabinet is the leading American administrative agency. Hinsdale's *History of the President's Cabinet* gives a history and digest of the cabinets through Taft's administration. Excellent chapters on the origin of the cabinet, the principles of cabinet-making, and the relation of the cabinet to the Congress and the President, are included. The student should also refer to Learned's *The President's Cabinet.*

Books on the executive departments include the following: Hunt, *The Department of State of the United States;* Ingersoll, *History of the War Department;* Easby-Smith, *The Department of Justice, its History and Functions;* Roper, *The United States Post Office;* and Warlass, *The United States Department of Agriculture.*

The Institute of Government Research has published a number of monographs on the government bureaus. They are excellent studies in the business

of the nation. They now include monographs on the Office of the Chief of Engineers, the Tariff Commission, the Bureau of Mines, the Bureau of Education, the National Park Service, and the Public Health Service.

Personnel problems and administrative methods are treated in Mayers' *The Federal Service;* Proctor, *Principles of Public Personnel Administration;* Meriam, *Principles Governing the Retirement of Public Employees;* Thomas, *Principles of Government Purchasing;* Oakey, *Principles of Government Accounting and Reporting;* Swenson, *The National Government and Business;* and Willoughby, *The Problem of the National Budget.*

The annual reports of the heads of the executive departments and of the chiefs of bureaus present excellent surveys of their respective functions.

The Business of the States

The business of the state governments is described at more or less length in the standard books on state government. The leading work is by Mathews, *Principles of State Administration.* The movement toward efficiency in state administration is discussed in Weber's *Organized Efforts for the Improvement of Methods of Administration in the United States,* and Moley, *The State Movement for Efficiency and Economy.* State budgets are treated in Agger's *Budget in the American Commonwealth;* Powell's *Budgetary Reform in the States;* and Willoughby's *Movement for Budgetary Reform in the States.* The reports of the heads of the state boards, organizations, agencies, and institutions disclose the principles, functions and methods of state business.

Municipal Business

The standard secondary account of municipal administration is Munro's *Municipal Government and Administration,* 2 vols. James' *Municipal Functions* and Capes' *The Modern City and its Problems* are helpful books on administrative functions of the city. Fairlie's *Essays in Municipal Administration* should be mentioned as one of the few general works on the subject. Police administration is discussed by the following authors: Graper, *American Police Administration;* Fosdick, *American Police Systems;* and Woods, *Policemen and Public.* Fire protection is treated in Croker's *Fire Prevention.* Planning and zoning of cities are discussed in the following books: Nolan, *Replanning of Small Cities;* Lewis, *The Planning of the Modern City* and Williams, *The Law of City Planning and Zoning.*

For the principles of traffic regulation in American cities, the student is referred to the excellent volume entitled *Street Traffic Control,* by Dr. Miller McClintock, Director of the Erskine Bureau of Street Traffic Research, Harvard University.

The administrative problems and methods of the various cities may be found in their year books, and in the annual reports of the city officials.

CHAPTER X

THE CONSTITUTION AND THE CITIZEN

Citizens are members of the body politic who owe allegiance to its sovereignty and enjoy the protection of its laws by right. In ancient times a citizen was one who possessed full rights—civil, political, social, and religious—in a city-state. His membership in the civic body conferred rank and power upon him at home, and entitled him to protection abroad. Citizenship in Rome was no mean privilege. It carried with it complete freedom of the city: the right to engage in trade and commerce, the right to marry, the right to vote, and, on occasion, to "appeal unto Cæsar." There was, it is true, a partial citizenship at Rome which carried civil but not political rights; such citizens were not far removed in status from aliens in the modern world, or nationals, or even children, and women before the Nineteenth Amendment. Citizenship among the ancients was a personal relation. A Roman citizen, wherever he might be, owed allegiance to Cæsar, and was entitled to the protection of Roman law and of the Roman legions. Sovereignty was not territorial; it was personal. During the Middle Ages, when public power was closely linked with the ownership of land, the idea of territorial sovereignty began to emerge; but the personal element in sovereignty and citizenship never entirely disappeared. So today citizenship is both personal and territorial. A citizen traveling abroad, although beyond the territorial jurisdiction of his sovereign state, is not beyond its personal jurisdiction. In general the United States acts upon the territorial principle in regard to criminal offenses, but in certain circumstances it does claim extraterritorial jurisdiction, as in the case of the transportation of explosives on a vessel or vehicle carrying passengers between the United States and foreign countries, in the case of murder on the high seas, of criminal correspondence with foreign governments, or of treason, perjury, or forgery.[1] Citizens may be called home in time of war to serve in the public armed forces. Thus a temporary sojourn abroad does not operate to sever the tie of allegiance and release a citizen from obli-

[1] Westel W. Willoughby, *The Fundamental Concepts of Public Law* (1924), p. 411, note. See especially *United States v. Bowman*, 260 U. S. 94.

gations to his home state. If he wishes to claim the protection of the flag in foreign lands, he must not be unmindful of his identity with the state which the flag symbolizes. In brief one cannot step out of one's citizenship by the simple act of leaving the shores of one's country.

Membership in the nation, which is denominated citizenship, is not a contractual relation, but rather a matter of status. Some writers, indeed, have insisted that the relation of public law between the sovereign and the subject is analogous to the relation of private law known as contract. This view seems to be reminiscent of the theory that civil society is the result of a social compact, and that once the body politic is formed by a consent of wills, a government is established by a similar agreement. Thus there are two contracts, social and governmental. If such is the correct interpretation of the nature of the state and government, citizenship is contractual in its nature. Citizens, then, do formally consent to obey the laws and to defend the country in return for the protection of its courts and its public armed forces. But the weight of opinion is against this analogy to private-law contract. Membership in an independent political community is more analogous to membership in a family. Citizenship is a status created by birth or naturalization. Family law has something closely akin to naturalization in the principle of adoption. In some states of the American Union adoption is essentially contractual, while in others it is strictly a judicial process, involving no element of contract, not even requiring the consent of parents. On petition a decree of adoption is issued creating a civil relation of paternity and filiation. After the same manner an alien becomes a citizen of his adopted country. When he has conformed to the requirements of law regarding declaration of intention and residence, he files a petition in a court of competent jurisdiction, and by judicial process his former allegiance is severed and his new allegiance established. He is now an adopted son, with practically all the rights and privileges pertaining to the native-born members of the family—that large public family known as the state.

I. Kinds of Citizenship

Owing to the duality of the American form of government, citizenship is dual. There is a national citizenship, and there is a state citizenship, each with its peculiar rights and duties, its privileges and immunities. It is even possible to separate them in theory one from the other and to envisage them apart. National citizenship alone is pos-

sessed by the inhabitants of the Territory of Alaska, of Hawaii, and Porto Rica, and by those who live in the District of Columbia. They can, of course, obtain state citizenship by the simple act of removing to a state and residing there. By the Fourteenth Amendment the states are deprived of the power to withhold their local citizenship from a citizen of the United States who wishes to reside in one of them; he will not be granted the right of suffrage until he complies with the state requirements in regard to age, residence, education, etc., but automatically he becomes a citizen of the state of his residence. This restriction upon the power of the states was made primarily to insure to emancipated negroes their civil rights. Without it the negroes might have found themselves free and rightless, so far as state courts were concerned. If the Dred Scott decision, based upon the principle that state citizenship was primary and national citizenship secondary, had stood, negroes might have been deprived of all the benefits of a régime of law, if any state had chosen so to deprive them. But the Fourteenth Amendment creates or expressly recognizes a citizenship of the United States, and makes it primary, drawing after it state citizenship by the simple fact of residence. "All persons," it declares, "born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Now by virtue of this amendment a citizen of the United States can practically compel a state to admit him into the membership of its political family, with the right to share on equal terms in its political life and activity. By birth or naturalization emancipated negroes, together with free negroes, became citizens of the United States under the Fourteenth Amendment, and automatically became citizens of the state of their residence. Of course, some states have invented ways and means of preventing persons of color from voting, but such devices do not include a denial of state citizenship, for that is prevented by the Fourteenth Amendment; neither do they include a denial of the franchise on the ground of race, color, or previous condition of servitude, that being guarded against by the Fifteenth Amendment.

By the side of national citizenship there remains a shadowy form of state citizenship. Now that national sovereignty and national allegiance have been established in the face of nullification and secession it means very little, but historically it is important; and only recently has the practice of allowing aliens to vote and hold office been generally abandoned. Before the Civil War the relation between the two types, national and state, was generally held to be just the reverse of

what it is today; that is, the state citizenship was dominant and national citizenship dependent. That was the view expounded by Chief Justice Taney in the celebrated case of *Dred Scott v. Sandford.* Moreover, he fixed such a wide gulf between the two that it was quite possible, in his theory, for a person to be a citizen of a state and not a citizen of the Union. "It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States." When he added that the right to vote conferred by a state did not carry with it state citizenship, he had built up a logical structure that effectually prevented negroes from invoking the aid of federal courts. Even if some states did grant negroes the right to vote, that did not make them citizens of those states; and even if they were citizens of those states, they were not necessarily citizens of the United States, with the right to sue in the federal courts. It was for the purpose of overturning this far-reaching decision, clarifying the whole issue, and reversing the relative rank of the two types of citizenship that the Fourteenth Amendment was added to the Constitution. So effectively has it done its work that there is little left of the famous logical structure which Taney built up except a name.

In states where aliens possessed political rights a question was not infrequently raised concerning state citizenship. Could an alien serve on a jury in Indiana when the courts accepted the rule that alienage was a bar to jury service? The question seems little more than mere tautology, but it has an answer. Persons who had declared their intention to become citizens of the United States could vote and hold office in Indiana, except the offices of Governor, Lieutenant-Governor, Senator and Representative in the state legislature. The Supreme Court of Indiana held that such political rights were sufficient to constitute state citizenship for the purposes of jury service. Thus the somewhat paradoxical situation resulted that a person might be an alien insofar as the United States naturalization laws were concerned, and a citizen insofar as state law was concerned. The Supreme Court of Wisconsin once ruled that resident aliens who declared their intention to become citizens of the United States became citizens of the State of Wisconsin. The Circuit Court of the United States has stamped this doctrine with its approval: "A person may be a citizen of a state but not of the United States; as an alien who has declared his intention to become a citizen, and who is by local law entitled to vote in the state of his residence, and there exercise all other local functions of local citizenship, such as holding office, right to poor re-

lief, etc., but who is not a citizen of the United States.'' [2] There can be no doubt that such a situation was paradoxical in the extreme and likely to become dangerous. Fortunately the matter adjusted itself through the good sense of the states which have refused, in increasing numbers, to grant political rights to aliens. There is now no state in which aliens may vote.

It is clearly established, then, that national citizenship takes precedence of state citizenship. The fact of residence is sufficient to join the two together, the national being dominant, and the state dependent. On the other hand, state citizenship cannot draw national citizenship in its train without conformity to the procedure laid down by Congress in its naturalization laws. Once again, therefore, it is obvious that the Union is national, and not strictly ''federal.'' But just what privileges and immunities belong to these two types of citizenship, respectively, is not easy to determine. In fact, the courts have not always been consistent in their delimitation of the respective fields. The Constitution requires (Art. IV, Sec. 2) that ''The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.'' In 1823 very wide latitude was given to the interpretation of this clause, known as the Comity Clause of the Constitution. In the case of *Corfield v. Coryell,*[3] decided by Justice Washington in the Circuit Court for the District of Pennsylvania, it was held that the privileges and immunities of citizens in the several states included those fundamental rights belonging to the citizens of all free governments, such as protection, the enjoyment of life, liberty and property, the right of transit and trade, of agricultural and professional pursuits, benefit of the writ of *habeas corpus,* actions at law, exemption from higher taxes than those paid by other citizens of the state, and the elective franchise. It was held also that not all rights belonging to the citizens of a state necessarily belonged to citizens of other states. Common property of the state, such as oyster-beds in New Jersey, are the exclusive possession of the state and can be controlled exclusively for the benefit of its own citizens. Here, then, is a substantial body of rights, not a few of them so-called ''natural,'' to which every citizen of one state is entitled in the several states. With the threatened disruption of the Union through secession and the pronounced reaction toward nationalism in the policy of reconstruction, an attempt was made to identify these privileges and immunities with those pertaining to citizens of the United States and placed under

[2] *Harding v. Standard Oil Co. et al.* (1910), 182 Fed. 421, 424.
[3] 4 Wash. C. C. 371, 380–81.

the care of the federal government by the Fourteenth Amendment. Had that attempt been successful it would have gone far toward converting our federal republic into a consolidated state, because the federal government would have been charged with the duty of protecting the civil rights of every individual in every state. But the attempt failed. In the *Slaughter-House Cases,*[4] decided in 1873, the court held that a clear distinction should be made between the privileges and immunities belonging to citizens of the several states, and those privileges and immunities belonging to citizens of the United States, and furthermore that the former "must rest for their security and protection where they have heretofore rested," namely, with the states. Few decisions have been more momentous and far-reaching than that one; it saved the groundwork of the "federal union," and turned the edge of the drive made against it in the name of consolidation. The fundamental rights of all free governments remain for their protection and guarantee with the several states, except insofar as the balance of the Union has been disturbed by amendment. Perhaps now there is not quite the same firm faith in "natural rights" that there was in 1823, and it would not be disputed that a state could modify these *fundamental* rights within limits; but it is securely established that if a state does modify these rights it must do so on the principle that the citizens of other states are entitled to the privileges and immunities of its own citizens.[5]

Having once separated the two classes of privileges and immunities, the court rendering the decision in the *Slaughter-House Cases* did not feel obliged to specify just what they were; but having touched upon the rights of state citizenship, as interpreted by Justice Washington, it felt disposed to outline, by way of *dictum,* the rights of national citizenship. These include: (1) the right to come to the seat of government, (2) to assert any claim a citizen may have against the government, (3) to transact business with it, (4) to seek its protection, (5) to share its offices, (6) to engage in administering its functions, and (7) to enjoy free access to its ports, to the sub-treasuries, land-offices, and courts of justice in the several states. They include also the protection of life, liberty, and property on the high seas or within the jurisdiction of a foreign government, the right peaceably to assemble and petition for redress of grievances, the privilege of the writ of *habeas corpus,* the right to use the navigable waters of the United

[4] 16 Wallace, 36.

[5] See Roger Howell, *The Privileges and Immunities of State Citizenship* (1918), in Johns Hopkins University Studies, Series XXXVI, No. 3.

States, and all rights secured by treaties with foreign nations. In addition, a citizen of the United States enjoys the privilege of becoming a citizen of a state by the act of residing therein, with the intent to remain, and is entitled to demand the same rights as other citizens of that state. To these the court adds the rights secured by the Thirteenth and Fifteenth Amendments, and the "due process" clause of the Fourteenth Amendment. An exhaustive list would include also the right of expatriation, the right of homestead, protection from violence while in custody of a United States marshal, the right to inform the government of any violation of its laws, and the right of free migration.[6] The Fourteenth Amendment creates no new privileges and immunities, either state or national. It does create or expressly recognize the status of national citizenship, and prohibits the states from abridging the privileges and immunities of this status. By judicial interpretation of the amendment the great body of substantive rights is left to the care and protection of the states, as heretofore, with certain restrictions as regards procedural rights, such as "due process" and "equal protection."

II. Nationals

Next in rank to citizens, moving down from full membership in the body politic, are nationals. They owe permanent allegiance to the state, and are entitled to its protection. They enjoy rights not possessed by aliens; on the other hand, their relation to sovereignty is more external than that of citizens. As a result of the Spanish-American War of 1898, an "American Empire," a term used by Hamilton and Marshall, began to take shape. A new type of territory appeared, one not incorporated in the Union. Porto Rico, the Philippine Islands and other insular possessions are governed by the United States through its sovereign right to acquire territory by treaty with foreign nations. Hawaii is territory incorporated in the Union, and is governed under the Constitution, like the Territory of Alaska. Porto Ricans were granted United States citizenship in 1917. That leaves the Filipinos and the inhabitants of other American insular possessions in the class of nationals. But these "citizens" of the far-flung American Empire are not without their rights. It is generally recognized that they are entitled to those great fundamental rights which are guaranteed by free governments everywhere, such as the protec-

[6] See Arnold J. Lien, *Privileges and Immunities of Citizens of the United States,* Columbia *Studies in History, Economics and Public Law* (1913), Vol. 54.

tion of life, liberty, and property, not infrequently denominated "natural rights." In the case of *Downes v. Bidwell,* already referred to, the court gave utterance to a rather extended *dictum* concerning the distinction between natural and artificial, or remedial, rights. The former, it held, should be extended to our insular possessions and would operate to prevent Congress from exercising unlimited power in regard to these possessions. To what extent the latter should be made operative in the new empire, must be left to the discretion of Congress. In this decision there is such frequent recurrence to "the general principles of the law of nations" that one is tempted to conclude that the relation between nationals and their sovereign state is one derived in part from international law. The Constitution, it seems, cannot form the organic law of an "American Empire." Congress legislates for the Philippine Islands through its treaty-making power. In its essence that is a power of international law incorporated into the Constitution. Filipinos are citizens of the Philippine Islands and nationals of the United States, and as such are entitled to protection when traveling abroad. Prior to 1903 the law declared that passports should be issued to none but citizens; but to provide for the protection of nationals abroad, the law was amended on June 14, 1903, so as to read: "No passport shall be granted or issued or verified for any other persons than those owing allegiance, whether citizens or not, to the United States."

Prior to the law of 1924 American Indians sustained a peculiar relation to the sovereignty of the United States. They were not citizens, nor were they aliens. Through their tribal organizations they possessed a certain corporate political capacity, enough to endow them with a peculiar sort of nationality. Their status was described by the Supreme Court in 1831 as that of "domestic dependent nations." They were regarded as being in a condition of pupilage; they were wards of the United States. Before the passport law of 1903 Indians were not entitled to passports on the ground that they were not citizens. As wards of the American nation they did receive the protection of American consular and other officials abroad, and in some cases they carried with them documents similar to passports. They had, in fact, about the same status that nationals now have. If they had been aliens, owing no allegiance to the United States, at least when traveling abroad, they would not have been entitled to any assistance from diplomatic and consular officers. By the act of 1887, Indians born in the United States who had severed their tribal connections and had adopted the habits of civilized life, were declared to be citi-

zens of the United States. A number of attempts were made, from about 1879 to 1924, to wean Indians away from their tribal relations, by holding out to them the bait of land allotments and citizenship. As a result of the generous and effective help given the allied cause in the World War by the American Indians, a movement to confer citizenship upon them took form and gathered momentum. It culminated in 1924 in a law of collective naturalization which dissolved tribal relations of long standing and made the Indians individually citizens of the United States. The act, approved on June 2, 1924, reads as follows: "That all non-citizen Indians born within the limits of the United States be, and they are hereby declared to be, citizens of the United States: *Provided,* That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property." This puts an end to the power of Congress to exercise plenary political authority over the Indians; they are no longer wards of the nation, except insofar as the nation is still trustee at law of their property. They are entitled to the right of suffrage on the same conditions as other citizens residing in the several states. They are permitted to register and vote. They have moved up from the status of nationals to that of citizens. Thus is written the last chapter of a long history relating to a conflict of nations, the one sovereign and dominant, the other domestic and dependent. At last the corporate political capacity of Indian nations in America has disappeared, and their ancient patriarchal form of government, the product of immemorial custom, has been forced to give way before the advancing civilization of the modern state, with its all-inclusive jurisdiction and its fundamental relation of sovereignty and citizenship.

III. Aliens

In a rank below nationals must be placed aliens. They might be likened to strangers in the household, who are welcome and treated with respect, but who do not enjoy the full rights of the members of the family. If they choose to leave, there will be no break in the family circle; if they seek to return, there may be no room to receive them. The household is not managed for their accommodation. They share temporarily the privileges and enjoyments of the family, without being at the same time an integral part of its organic life. Aliens remain outside the body politic. They owe local allegiance to the state of their residence; they must obey the laws, and, on occasion, even assist in preserving order and in saving the community from danger; and

they may be granted civil rights substantially equal to those pertaining to citizens. In a number of states aliens were granted the right to vote and to hold certain public offices; but in general the status of the alien does not rank as high as that of the citizen. In the first place, sovereign states reserve the right to decide how many, and of what type, and on what conditions, aliens shall be permitted to enter their ports. In the second place, once an alien sets foot on the shores of a sovereign state, he comes under its jurisdiction; his rights and duties are determined by municipal law, limited only by the general obligations of international law. Members of the family of nations, by a sort of international comity, have agreed tacitly to receive one another's nationals, subject to the sovereign right of exclusion and municipal regulation. Hence a foreigner on American soil has back of him the state of his allegiance which can properly insist that rights guaranteed by international law shall not be denied its subject or citizen. In the third place, political rights are for the most part denied to aliens, and serious inroads are sometimes made upon their civil rights, or such civil rights as they would possess if they were citizens. For example, a full complement of property rights which all citizens enjoy may be denied aliens through alien land laws. In Pennsylvania aliens are forbidden to hunt game, and to that end are prohibited from possessing firearms of long range, such as rifles and shotguns. Aliens may be denied employment on public works. Certain classes of aliens are not permitted to seek naturalization. Alien enemies are liable to be apprehended, restrained, and removed. Finally, an alien's right to remain in the country is not constitutional but political, and may be terminated by administrative order and without trial by jury. Aliens entering the United States in violation of law may be deported, but they must not be subjected to infamous punishment at hard labor or suffer confiscation of property. One who has made a declaration of intention to become a citizen and has resided in the United States for three years is entitled to a passport valid for six months, but it is non-renewable, and affords no protection in the country of which he was a citizen.

Thus there are in the United States and its appurtenant territories, (1) two types of citizens, state and national; (2) citizens of the Philippine Islands and nationals of the United States, together with the nationals of our other insular possessions; and (3) aliens. It would be a mistake to assume that these classes are static, remaining fixed in number and status, for quite the contrary is true. There is nothing to prevent a citizen of the United States in Alaska, for example, from

moving down and residing in the State of Washington, or California, or any state on the Pacific Coast, or anywhere else in the United States, and thus taking on a new status. Nationals may seek naturalization and become citizens of the United States and of the state wherein they reside. Aliens may become naturalized. Citizenship in the United States is acquired by birth or by naturalization. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." But children born of foreign sovereigns traveling through the country, of foreign ministers, of enemies during hostile occupations, or of aliens born on foreign vessels in American territorial waters, are not born subject to the jurisdiction of the United States and are therefore not citizens. Formerly children born of Indians in tribal relations were not citizens. The United States follows the ancient common-law principle of *jus soli*—the law of the place. All who are born within the territorial limits of the United States, whether or not the parents are citizens, even if they are ineligible to citizenship, are, with the exceptions noted above, citizens of the United States. America also claims as its citizens children born of American parents abroad, according to the *jus sanguinis*—the law of parentage. But the descent of American citizenship is short-lived unless there be a renewal of contacts by a return to the United States. The members of the third generation cease to be American citizens if the second generation fails to renew its faith in the principles of American democracy and to revive its inspiration by a sojourn on American soil. In case a foreign state claims as its citizen, by the *jus soli,* a child born of American parents, which at the same time is claimed by the United States as its citizen under the *jus sanguinis,* a conflict of laws arises and must be worked out by some *modus vivendi.* A foreign state may demand that such a citizen, on reaching the age of majority, shall decline formally the nationality of the place of his birth, or be held to the obligations of citizenship. The act of 1907 requires that children born of American parents abroad, shall when they become eighteen years of age, record at an American consulate their intention to become residents and remain citizens of the United States, and on reaching their majority take the oath of allegiance to the United States.

In the building-up of the United States immigration has played an important part. At one time more than a million immigrants a year came to our shores. States in the Middle West, vying with one another for settlers, offered as an inducement the privileges of state citizenship to anyone who would take out his "first papers." However un-

sound that practice may have been, it did give a tremendous impetus to the movement for naturalization. An immigrant on arriving in America, provided he be eighteen years of age, is permitted to file with a court of competent jurisdiction, state or federal, a declaration of intention to become a citizen of the United States, renouncing all allegiance and fidelity to any foreign power. Such a declaration must be made at least two years prior to admission to citizenship. A continuous residence of at least five years in the United States, and of at least one year in the state or territory where the court is held, is required before a petition for "final papers" can be filed. If more than seven years should elapse between the declaration of intention and the petition, a new declaration must be filed. Not less than ninety days after the filing of the petition, the applicant may be granted a hearing before the judge of the court. If the judge can satisfy himself that the applicant is a person of good moral character, neither an anarchist nor a polygamist, can speak the English language, except in certain specified cases, and knows something of American institutions, he administers the oath creating a new political relation and a new allegiance; and a certificate of naturalization is issued. Only white persons and persons of African nativity or descent are eligible. In determining parentage or blood the opinion of the man in the street is given more weight than all the results of anthropological research. A "white man" is one who is considered by people generally to be "white." Europeans and Caucasians bordering on the Mediterranean Sea come within the privileged classes; whereas Chinese, Japanese, and Burmese are excluded, not being eligible to citizenship even by military service. American Indians are not "white," and the general naturalization laws have never applied to them. In addition to voluntary individual action by judicial process, naturalization can take place by political incorporation, as in the case of the Louisiana and Florida cessions, and the annexation of Texas and of Hawaii. By act of Congress in 1917 the Porto Ricans were granted the full status of American citizenship; and by legislative act in 1924 the American Indians received collective naturalization.

While it is true that naturalized citizens are received into the body politic on practically equal terms with natural born citizens, it should not be forgotten that the highest offices in the land, the Presidency and the Vice-Presidency, are closed to them, nor can they be elected Representatives in Congress until they have been citizens of the United States for seven years, which is equivalent to a minimum residence requirement of twelve years, or Senators until they have been

citizens nine years, which is equivalent to a residence requirement of fourteen years. Thus public law in the United States does discriminate between native-born and naturalized citizens.

IV. Expatriation

Just as it is possible to dissolve the family bond, natural or civil, and permit members to go their separate ways, forming new family alliances, so it is possible to dissolve the political bond of allegiance, natural, judicial, or legislative, and permit citizens to find new attachments in other lands. In theory, if the state rests upon a social compact, and citizenship is contractual, the consent of the government must be obtained before a citizen can renounce his allegiance, thus expatriating himself. That was in fact the principle of the English common law. But American revolutionary theory recognized expatriation as one of the natural and inalienable rights of man which no government could violate without injustice. Thomas Jefferson, in his *Summary View,* built his entire imperial scheme around the idea of the natural right of expatriation. But American courts have not always followed American political theory. In the absence of statutory regulation they have not infrequently adhered to the principle of the common law. With the establishment of independence and the setting of the tide of immigration toward American shores, the question of double allegiance became acute. If allegiance was "indelible," as the common law held it was, what took place when aliens were naturalized in the United States? They simply superimposed a new allegiance upon an old one. An Englishman, for example, could be a citizen of Great Britain and of the United States at the same time. In the early years of the nineteenth century such a situation was highly embarrassing, especially in view of the unpleasantness incident to the separation of the colonies from the mother-country. The War of 1812 was fought primarily to settle the claim put forward by Great Britain of the right to search neutral vessels on the high seas for British subjects, on the ground that allegiance was "indelible." But it was not until 1868 that American theory, executive utterances, and judicial practice were brought into harmony by statute. By act of Congress of that year the right of expatriation was declared to be one of the fundamental principles of the Republic, a natural and inherent right, indispensable to the enjoyment of life, liberty and the pursuit of happiness. Thus has the philosophy of Thomas Jefferson triumphed.

Prior to 1907 there was no statutory mode of renouncing and abandoning United States citizenship. Intent was to be inferred from

outward act. If a citizen "emigrates, carries his family and effects along with him, manifests a plain intention not to return, takes up his permanent residence abroad, and assumes the obligation of a subject to a foreign government, this would imply a dissolution of his previous relations with the United States."[7] It was held that naturalization and accepting public employment under a foreign government, engaging in its military service, and assuming other obligations of citizenship in the country of domicile, constituted sufficient evidence of voluntary expatriation. But enlistment in the military service of a foreign power does not of itself involve renunciation of American citizenship. In 1907 the whole matter was cleared up considerably by a statutory definition of what constituted expatriation: "That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state." Furthermore, naturalized citizens who have resided two years in the country of their former allegiance, or five years in any other foreign country, shall be presumed to have lost their citizenship. No citizen shall be allowed to expatriate himself when this country is at war. By the same act it was provided that an American woman marrying a foreigner should take the nationality of her husband; and on termination of the marriage she should have the right to resume her former citizenship, by registering at an American consulate abroad or by residing in the United States. Fifteen years later American public policy as regards the citizenship of married women underwent such a fundamental change as to amount almost to a reversal. The act of September 22, 1922, lays down the general rule that the marriage of women effects no change in their status as citizens, except in the case of an American woman marrying an alien ineligible to citizenship. In that event she loses her citizenship. In other cases, however, such as the marriage of an American woman with an alien or the marriage of an alien woman with an American, the woman retains her original nationality. Furthermore, an alien woman can be naturalized even though her husband remains an alien, and an American woman who lost her citizenship prior to 1922 by marrying an alien, may regain it by naturalization. The net result of this act is to exalt nationality above marriage, and to open the way for married women to an independent status in public law. Desertion from the military or naval forces, involving a departure from the United States, operates to forfeit citizenship.

[7] John Bassett Moore, *Digest*, III, 711.

V. Obligations of Citizenship

Early in American colonial history the principle was accepted that the colonists, in return for imperial protection, would pledge their allegiance to the crown, come to its aid in time of need, and do whatever lay in their power to preserve the unity and enhance the glory of the British Empire. This was sound political philosophy. Sovereignty and allegiance involve a certain *quid pro quo*. Only in the highly speculative theory of the divine right of kings, is it possible to justify obedience without the slightest guarantee of any public service on the part of the sovereign. But with the advent of democracy the theory of the divine right of kings fell into the discard. True, some democratic theory is about as speculative as the *jure divino*, emphasizing a mystical public person and an elusive general will; but the present drift of thought is toward objectivity in political theory. By what right does the modern state command the allegiance of its citizens, levying on their property in the form of taxation, impaneling juries from among their number, issuing forced loans in time of war, calling its young manhood to the colors, and even mobilizing all the forces of the nation against a common enemy? There is but one adequate justification of this exercise of supreme right, and that is the indispensable public service performed by governments in peace and in war. There are some basic social functions which must be performed if the orderly processes of life are to continue, and men are to accomplish anything worth while. They can all be summed up briefly in the services of the state in maintaining a régime of law, in providing for national defense, and in promoting the general welfare. Without the basic services of law, order, security, justice, defense, and welfare, life would not be worth living and all productive activity would come to a standstill. The state is in partnership with every citizen, the merchant, the trader, the banker, the farmer, the lawyer, the physician, and the minister. They all share in the advantages of a régime of law, its protection of their rights, its positive aid through the courts in carrying on business and professional pursuits, and its encouragement of scientific research and discovery. Without the help of the state there could be but little production of goods and services, but slight cultivation of the fine arts, and no appreciable amount of scientific investigation, for all of these branches of human activity presuppose the very service which it is the function of the state to supply, namely, the maintenance of orderly and safe, fair and just, even convenient and comfortable,

processes of life. But so organic and unobtrusive is this public service that the unthinking citizen seldom appreciates its true worth. Like the organs of the human body, which are noticed least when they function best, the great machinery of the state operates normally with scarcely a passing thought from the man in the street.

If this be a correct view of the nature of government, especially in a democracy, the duties of citizenship are obvious and imperative. The good citizen, in the first place, will put no hindrance in the way of the state's performance of its vital and necessary public functions. That means obedience to the laws of the state, encouraging the spirit of law obedience, and standing staunchly against the disintegrating forces of anarchism, in whatever guise they appear. In the second place, citizenship in a democracy implies active and direct coöperation with the government in the performance of its public functions, in the way of serving on juries, voting, holding public office, if elected thereto, and serving in the military forces of the country. The right of suffrage, it is true, is not co-extensive with citizenship, for not all citizens have the right to vote; but that only reinforces the argument that those who can vote should not fail to vote. In a democracy every voter is in a sense a public servant, a representative of the mass of people who are politically inarticulate by reason of political minority or other deficiencies in regard to the qualifications for suffrage. In the third place, intelligent citizenship calls for the high service of molding and directing public opinion. Jefferson and Madison had unlimited faith in the power of public opinion. Jefferson thought that if the people had their newspapers they could get along without much government. But since his time, population has increased enormously, the state has widened its jurisdiction, and the functions of government have multiplied many times over. The machinery of modern democracy is now so vast and complicated that the demands it makes on the intelligence and patriotism of citizens are exceedingly heavy and insistent. There is a danger of asking the electorate to do too much—to vote too many times a year, to pass upon too many measures, and to elect too many men to public office. But in any event, whether the ballot be short or long, intelligent citizens will always be looked to as centers of public thought and discussion. They will be expected to serve as human guide-posts to those who have lost their way in the maze of political issues. They will be expected to find places in party organizations and render to the state the service of political leadership.

Good citizenship is hindered and even made impossible when intelligent and devoted patriotism is supplanted by the desire for private

gain. When the state ceases to be recognized as a great public-service corporation, indispensable to the protection of life, liberty and property, to the promotion of the health, safety and morals of the community, and comes to be regarded as an engine of power in the exploitation of one class by another, of the weak by the strong, of the poor by the rich, then has free government vanished, and in its place there is raised the ugly head of autocracy or dictatorship. The public good is the end of the state. The general interest must take precedence of private interests. Viscount Bryce enumerated as hindrances to good citizenship: indolence, personal self-interest, and party spirit. Our fragmentary knowledge of the reasons for non-voting in the United States seems to bear out Bryce's analysis. There are lazy citizens; there are selfish citizens; and there are citizens who abuse the party system, prostituting it to their own private and selfish ends. Unfortunately there exists no ready and easy way to overcome these hindrances. The ship of state cannot always have clear and calm sailing. There will be storms and rough weather periodically. All the stronger is the reason, then, why citizens of a democracy should have the alertness and skill of navigators, their fine sense of responsibility, and their trust in expert devices, if the ship of state is to sail on, riding out the storm, and anchoring peacefully in the harbor of her destination.

READING NOTES

The Constitution does not define the term "citizen," except insofar as it is done by the Fourteenth Amendment: hence, the supreme importance which attaches to this amendment. For an analysis and exposition of this body of rights, see Henry Brannon, *A Treatise on the Rights and Privileges Guaranteed by the Fourteenth Amendment to the Constitution of the United States* (1901). In that great repository of international law and relations, John Bassett Moore's *Digest of International Law,* the student will find ample material on American citizenship and nationality, especially in volume III. In the *Slaughter House Cases* a distinction was drawn between citizenship of the United States and citizenship of the several states. See also *United States v. Cruikshank* for a statement of the doctrine that citizenship in the United States and citizenship in a state are distinct and may be separately acquired. At least two university studies have been devoted to an analysis and description of these two types of citizenship: one at Columbia by Arnold J. Lien, *Privileges and Immunities of Citizens of the United States* (1913), and the other at Johns Hopkins by Roger Howell, *The Privileges and Immunities of State Citizenship* (1918). Treatises on constitutional law contain chapters on the rights and obligations of citizenship. A recent

work which is adequate in this respect is Charles K. Burdick, *The Law of the American Constitution* (1922). A study which touches upon the international phase of citizenship is, *Recent Theories of Citizenship in its Relation to Government,* by Carl Brinkmann (1927). Special studies on citizenship include two monographs, F. Van Dyne, *Citizenship of the United States* (1904), and J. S. Wise, *A Treatise on American Citizenship* (1906).

Yale University has performed a notable service for the country by sponsoring popular lectures by distinguished men on various aspects of Citizenship: see David J. Brewer, *American Citizenship* (1902), William H. Taft, *Four Aspects of Civic Duty* (1906), Elihu Root, *The Citizen's Part in Government* (1907), and James Bryce, *The Hindrances to Good Citizenship* (1910). See also *Promoting Good Citizenship* (1913) by Bryce. The American Bar Association, sensing a need for popular information regarding the American government and for the vitalizing of instruction in Americanism, organized a series of addresses in 1925 on *American Citizenship,* which was delivered by John W. Davis, Philip Cook, Albert C. Ritchie, Luther B. Wilson, and Charles E. Hughes. The same Association, through a committee, composed of F. Dumont Smith, Edgar B. Tolman, and Ernst Freund, made a thorough canvas of suitable texts on American government and citizenship, and placed the stamp of its approval and recommendation on the following works, as "more or less indispensable for students of the Constitution of all ages, and particularly in schools and colleges":

The Critical Period of American History, by John Fiske; Houghton-Mifflin Co., Boston; one volume.

The Story of the Constitution, by F. Dumont Smith, copyright owned by the Committee on American Citizenship; one volume.

The Constitution of the United States: Its Source and Its Application, by Thomas J. Norton; Little Brown & Company, Boston; one volume.

The Constitution of the United States, by James M. Beck; George H. Doran Co., New York; one volume.

The Short Constitution, Wade and Russell; American Citizenship Society Press, Grand Rapids, Mich.; one volume.

An Introduction to the Study of the American Constitution, by Professor Charles E. Martin, of the University of Washington. Oxford University Press; New York; one volume.

Congress, the Constitution and the Supreme Court, by Charles Warren; Little Brown & Co., Boston; one volume.

The Committee also recommended additional books "for the more intensive student who desires a broader knowledge of the whole subject" as follows:

The *Federalist,* Lodge's edition, *The Supreme Court in United States History,* by Charles Warren, *Life of John Marshall,* by Albert J. Beveridge, *Our Changing Constitution,* by Charles W. Pierson, *Alexander Hamilton,* by Fredrick G. Oliver, and *The Citadel of Freedom,* by Randolph Leigh.

Civic instruction has come to engage the attention of progressive educators throughout the country. The press teems with books on civic and social

education. The problem method has been applied effectively to civic instruction by William Bennett Munro in *Current Problems in Citizenship* (1924). The human side of citizenship has been strikingly portrayed by the same author in *Personality in Politics* (1924).

CHAPTER XI

PARTIES AND PARTY PLATFORMS

The American theory of government in its inception was irreconcilable with definite party responsibilty and control. For better or worse, Americans developed the idea of separation of powers, coupled with checks and balances, to the end that no man or body of men could shape public policies. They intended to cancel out the human equation, leaving only the rule of law. John Adams made it very plain in the Constitution of Massachusetts of 1780 that the purpose of the separation of powers, with the accompanying system of checks, was to insure a government of laws and not of men. Cabinet-parliamentary government, on the other hand, concentrates political responsibility and control in the hands of the leader of the majority. The Cabinet is both an executive and legislative organ. On the one hand, it brings forward, and matures, and sees through the legislative process, public policies of which there is need; on the other hand, it acts as an executive in matters of domestic administration and foreign affairs. It is a sort of hyphen or buckle, as Bagehot describes it, connecting legislative and executive functions. It makes for flexibility in government, greater responsiveness to the will of the majority, and more definite localization of political responsibility. But the framers of the American Constitution were seeking order and stability and the protection of private rights, not flexibility and responsiveness. They knew what they wanted, and they got it. Consequently there was at first little room for political parties. The cabinet-parliamentary form, functioning on the basis of a fusion of powers and definite party responsibility, would have been regarded by John Adams as a government of men and not of laws. There the human element is prominent. The will of the majority can be given effect without delay. Parties are composed of men and women, acting from human and not always disinterested motives. Adams and the Fathers wished to provide against all human contingencies and human frailties; they strove for a certain mechanical perfection in governmental organization that would leave little if any room for the vagaries of the human will.

I. Historical Party Cleavages

But despite their best intentions, and in face of solemn warnings against parties and factions, lines of cleavage began early to appear. In fact even before the "more perfect union" was established, thought and feeling had become polarized around the imperial question. The "loyalists" were those who believed in parliamentary supremacy and in preserving intact the golden link of empire; whereas the "patriots" were those who opposed parliamentary supremacy and eventually came out for separation from the mother-country. If the dominant issue of colonial politics of that period be regarded as turning on the question of the proper relation between Great Britain and her colonies, one might speak of "loyalist" and "patriot" as party names, representing party alignments, and indicating a struggle for the control of a political situation, in order to make effective in public policy, each its own set of ideas. Of course, with the advent of independence, all public opposition to separation became a matter of bad taste, to say the least. However, the struggle continued, not on the basis of public policy, for that had been settled by the treaty of 1783, but on the basis of personal animosity, and because the "loyalists" gave evidence of being a recalcitrant minority. Had the "loyalists" and "patriots" been true political parties, the former, when put in a minority by events beyond their control, would have bowed to the will of the majority, and would have taken their place in the ranks of the recognized opposition. That they were driven out of the country and their property confiscated, is a sad commentary on the political thought and feeling of the time.

The question of the ratification of the Constitution gave occasion for another polarization of thought. The old colonial jealousies and particularisms which had made the Confederation so unworkable were perpetuated by a group which believed in the freedom, sovereignty, and independence of each state. Their conception of the Union was essentially an international law conception. Consequently when the question of ratification was before state conventions these "federal" men opposed the national, consolidating features of the Constitution. They feared that the executive was too strong, that judges appointed for life would become autocratic, and that the supremacy of the Constitution and of laws and treaties made in pursuance thereof would leave little room for state constitutions and laws. George Mason of Virginia had objected from the first that the Constitution contained no bill of rights, and that through its national supremacy it would

render nugatory bills of rights in state constitutions. On the other hand, there was a group which emphasized the idea of sacred union on which independence was founded, the national will back of all political forms, and the necessity for certain national powers pertaining to the general government, such as the right to levy taxes, regulate commerce, and provide for national defense. Here, then, were two political parties or factions. Here was a party alignment on a constitutional question, on a form of government. It is well known that compromises were struck in the state ratifying conventions as well as in the Constitutional Convention. The "federal" men conceded the point of ratification on condition that a bill of rights should be added to the Constitution by way of amendment, and this was done. As in the case of independence, the adoption of the Constitution put an end to the division of public opinion on that specific question, or at least rendered futile any further opposition to the "more perfect union."

But once the new government was in operation, party lines began to appear in no unmistakable fashion. President Washington, a firm believer in the doctrine of sacred union, sincerely hoped to surround himself with the best men regardless of party. He had an instinctive and deep-seated dislike for the spirit of party and faction, and it cropped out plainly in his Farewell Address. He thought the President should represent all the people, and not a fraction of them; and so he invited men of diverse political views to join his first cabinet. But the experiment of a non-partisan cabinet was not a success. The group was too small to contain two such able leaders as Alexander Hamilton and Thomas Jefferson, who in no respect saw things eye to eye. Their systems of political philosophy, respectively, had nothing in common. Hamilton believed in strong, energetic, and centralized government which could guarantee order and stability and the maintenance of property rights; Jefferson, just back from France, was thinking of liberty and equality, of the rights of man, in terms of state rights and federalism. He suspected Hamilton's nationalism, as manifested in his financial policies, the funding of the national debt, the assumption of state debts, the excise, protection of manufactures, and the national bank, as tending toward consolidation and even toward monarchism. He talked vaguely of a "corrupt squadron," and hinted that some members of the administration did not have at heart the welfare of the people. Thus it was in Washington's first cabinet that the first real party cleavage, which has continued with varying degrees of clearness until the present, manifested itself. Surely it was the irony of fate that led Washington, a sincere lover

of peace and concord, to bring together two such incompatible spirits as Hamilton and Jefferson, representing two incompatible systems of politics, and each ready to head a movement that would eventuate in a party.

The Federalist Party might better have been termed the Nationalist Party, because it took its cue from the nationalizing philosophy of Alexander Hamilton and others who believed in a government of wide powers, both expressed and implied. Hamilton's theory of liberty was organic. If only the nation could have liberty to function in the exercise of its national powers, in regard to commerce, taxation, and defense, the establishment of public credit and the protection of manufactures, it would matter little if private rights were limited to some extent. And it would be a positive gain if the Constitution could be so liberally interpreted as to find warrant for a national bank and a protective tariff, helpful means of building up public credit and prosperity. Accordingly every nook and cranny of the Constitution was searched diligently to find authorization for the exercise of wide governmental powers. Washington's administration did much to nationalize the Union, both at home and abroad. Hamilton's financial policies drew from the Constitution all of its hidden powers of national sovereignty, and Washington's foreign policy of neutrality proclaimed to the world that the United States of America was a free, sovereign, and independent nation, and in nowise a satellite of any foreign power. In the Supreme Court John Marshall was expounding the same doctrine; namely, the right of the nation to function through it organs of government.

This liberalizing of the Constitution, so to speak, this tendency toward a strong central government as manifested in executive policy and judicial decisions, gave offense to the lovers of individual liberty and the rights of man, to those who feared that the states might be swallowed up in a great consolidated union. As spokesman for this group Thomas Jefferson stood forth. He was Secretary of State in the small cabinet of four members in which Alexander Hamilton was Secretary of the Treasury. There the stream of party politics began to divide, one branch flowing in the channels of the Federalist Party, the other flowing in the channels of the Democratic-Republican Party. Thus Washington's first cabinet marks the "great divide" in American party history. Jefferson was a consummate party-leader. Nothing that could advance the fortunes of his party escaped his notice. The pro-British attitude of the Federalists was played up into a bogeyman of aristocracy and monarchism. He levied on the wide-

spread sympathy for the French Republic. He used popular resentment against the Alien and Seditions Acts to proclaim the doctrine of state rights and something akin to nullification. The Kentucky and Virginia Resolutions were primarily a political broadside issued to weaken the hold of the Federalist on the country and prepare the way for the capture of public power by the Republicans. By 1800 his efforts showed results. In that year the Federalists, with their ideas of national policy and national power, were turned out of office, and the Republicans, with their ideas of individual liberty and state rights together with weak central government, having only expressed and delegated powers, were installed in their place.

It is not necessary for our purposes to follow the varying fortunes of Federalist and Republican, tracing how the Federalists espoused the principles of the Republicans on occasion and how the Republicans adopted the principles of the Federalists now and then, or to assign causes for the total disappearance of the Federalist Party and for the bifurcation of the Democratic-Republican Party into National Republican, later Whig, and "Jackson men," later Democrats. Jefferson said in his first inaugural address: "We are all Federalists, we are all Republicans," and with the advent of an "era of good feeling," under President Monroe, his words literally came true. Next to the separation from the mother-country and the adoption of the Constitution, the question which did most to divide the Union into two camps and crystallize public opinion into two irreconcilable groups was that of slavery, in its relation to the nature of the Union. Actually the gash which it made in the body politic was deeper and took longer to heal than that made by the War of Independence or the adoption of the Constitution. A definite and fixed polarization of interests into major and minor developed out of the slavery issue and rendered democratic government well-nigh impossible. Before the Civil War there were Jacksonian Democrats and Calhoun Democrats, the one strongly unionist, the other gravitating toward nullification and secession. The Civil War drew a sharp line between the Republican Party which supported the appeal to arms and a vigorous policy of reconstruction, and the Democratic Party which was in opposition on government war measures and the policy of reconstruction. Of course, secession robbed the Democrats in Congress of a large share of their representation, but what was left denounced the war measures of the Republicans and demanded a cessation of hostilities on the ground that the war was a failure. Following reconstruction, questions relating to suffrage, currency, prohibition, alienage, labor and capital,

imperalism and foreign affairs constantly arose, necessitating party alignments and commitments.

II. The Place of the Platform

Party platforms should not be taken too seriously. They are something like trial balloons released to determine the direction of upper air currents. When conditions are shown to be adverse, no high-flying is attempted. In 1896 the Republican leaders planned to wage their campaign on the tariff issue, but the currents of public opinion were adverse, and the fight turned on the money question. In 1912 the newly-born Progressive Party laid before the people a large and varied assortment of political issues, but their appeal was neither wide enough nor strong enough to overcome the handicap of a divided party, and the Democrats rode into power. Party platforms take shape and color from current political issues as viewed by the party in power or the opposition. A pardonable pride in a fine record of achievement will lead the party in power to make its platform a sort of bandstand from which to broadcast sweet music, while the opposition will do all it can to drown out the harmony or produce discord. The successful party will fill its platform with endless proofs of "constructive statesmanship," not neglecting to "challenge comparison" of its record from any and every quarter, while the unsuccessful party will find many reasons for "denouncing" the policy of the administration and "viewing with alarm" the state of the country. It is chiefly a game to catch votes. Genuine conviction, it is true, has not been wanting in American politics. Moral and religious issues have played a prominent rôle in determining the fortunes of political parties. There have been crusaders, men and women, who went forth to do battle for the right as they saw it, for abolition, woman suffrage, prohibition, the Bible in the public schools, better observance of the Christian Sabbath, and child-labor legislation. But it is worthy of note that major parties as a rule do not take up moral questions until they contain some promise of votes. The moral crusading has been done mostly by minor parties, the capturing of votes by the major parties.

A study of party platforms will almost convince one that government is primarily a tool of reform. Principally on the part of the opposition is there incessant demand for a mending of ways, moral, monetary, industrial, social, and political, both in the internal policy of the country and in its foreign relations. Of course, the party in

power gives itself to a defense of things as they are, accompanied by glowing promises for the future. So between the "ins" and the "outs" a fairly well-balanced program of legislation is laid before the people. However, issues are not always clearly stated, because one object of party platforms is to conceal dangerous issues. For years the major parties contented themselves with platitudes concerning the value of women to the world in general, their wider spheres of usefulness, the party's duty to be mindful of their rights and interests, and to see that they were accorded equal opportunities with men; but not a word regarding suffrage. When prohibition became a political issue through the rise of the Prohibition Party, the old-line parties sedulously kept clear of it, contenting themselves with fulminating against sumptuary laws and interference with the individual rights of citizens. For circumlocution and equivocation the language of party platforms has no parallel in the whole wide universe. Every group opinion and interest must be satisfied that it has not been neglected in the drafting of the platform, so that the result is often a hodge-podge of platitudes about the rights of man, the dignity of labor, and a few words concerning the tariff. With the passing of the years party platforms are growing longer and more diversified. In 1840 the Democratic platform was a scant page and a half in length, mostly abstract theory of government, while in 1920 it was fifteen pages long, and contained thirty-eight distinct topics. The Republican platform of 1920 quotes from a magazine article, like other campaign documents. The growing complexity of our civilization, coupled with keen competition in platform drafting, brings pressure to bear upon a party to leave no issue untouched, either by way of elucidation or obscuration.

III. Classification of Party Issues

The nature of the Union has come in for its full share of treatment at the hands of the makers of platforms. Not an abstract constitutional theory, except by way of reminiscence—a sort of gesture back to the Declaration of Independence and the Federal Convention—is the nature of the Union treated, but as a means of criticizing the party in power and of re-affirming a traditional position, with a full measure of pride in past achievement. As late as 1912 the Democratic Party was expounding the proper relation between state and nation, faithful to the Jeffersonian traditions. "There is no twilight zone between the nation and the State in which exploiting interests can take refuge

from both. It is as necessary that the federal government shall exercise the powers delegated to it as it is that the States shall exercise the powers reserved to them, but we insist that Federal remedies for the regulation of interstate commerce and for the prevention of private monopoly, shall be added to, and not substituted for State remedies."[1] The practical purpose which the Democrats had in mind in elaborating their theory of the Constitution was to protect the people from injustice dealt out by corporate interests. Earlier, in 1900, the doctrines of the Declaration of Independence, especially the consent of the governed, were invoked by the same party to prove that imperialism was contrary to the rights of man. In their fight against over-centralization, which they interpreted as the work of selfish interests, the Democrats in 1896 held up for the approval of the country "the dual scheme of government established by the founders of this Republic of republics. Under its guidance and teachings the great principle of local self-government has found its best expression in the maintenance of the rights of the States and in its assertion of the necessity of confining the general government to the exercise of the powers granted by the Constitution of the United States."[2] The Republicans met the imperial issue arising out of the acquisition of new territories and our peculiar relation to Cuba with silence as regards the Constitution, contenting themselves with a flourish back to Abraham Lincoln: "To ten millions of the human race there was given 'a new birth of freedom,' and to the American people a new and noble responsibility."[3] In 1880 they declared, chiefly by way of reminiscence it would seem, that "The Constitution of the United States is a supreme law, and not a mere contract. Out of confederated States it made a sovereign nation. Some powers are denied to the Nation, while others are denied to the States; but the boundary between the powers delegated and those reserved is to be determined by the National and not by the State tribunal."[4] It is not quite clear just why this flourish of former times was inserted, unless it was to get a good start for what was to follow, or more probably because a similar sentiment had been expressed in the platform of 1876, the one-hundredth anniversity of the Declaration of Independence. In general the Democrats have borne down more heavily on constitutional interpretation in their party platforms than have the Republicans. Just as Jefferson and Madison fell back on the nature of the Union to criticize the

[1] Kirk H. Porter, *National Party Platforms* (1924), p. 323.
[2] *Ibid.*, p. 181–82.
[3] *Ibid.*, p. 229.
[4] *Ibid.*, p. 109.

policy of the Federalists, as Calhoun used the Constitution to criticize the tariff, so Bryan and his colleagues resorted to the same type of argument to prove Republican administrations in error. The Constitution is like an old war-horse which is used by an army to draw its cannon up to the trenches, and then is captured by the enemy and used by them to draw their cannon up to the trenches.

Moral reform has not been without a place in party platforms. Those who would make over the social order in which we live have made use of party groupings and pronouncements to set before the country their ideals and to rally the support of public opinion for their realization. True, such reforms have been sponsored in the first instance, as a rule, by some minor or third party; but as they grew in popularity and began to command the attention of the entire country, both major parties have swung into line and made the issues their own, as in the case of prohibition. Questions involving moral issues which have found embodiment in platforms are, among others, abolition, prohibition, polygamy, the Bible in the schools, the observance of the Sabbath, and child labor. In 1892 the Prohibition Party made an issue of the right to appeal to the "higher law" and ethical principles in politics. It stigmatized the protest of the major parties against the introduction of moral issues as "a confession of their own degeneracy." The Liberty Party, formed in 1840 and making its first platform in 1844, declared that the Constitution was a series of agreements, covenants and contracts between the people, each with all and all with each, and that: "It is a principle of universal morality, that the moral laws of the Creator are paramount to all human laws; or, in the language of the apostle, that 'we ought to obey God, rather than men.' "[5] But these apostles of Liberty were restrictionists rather than abolitionists. The first clear, ringing declaration of abolition found in a party platform was that of the Free Democrats of 1852, which proclaimed that "slavery is a sin against God and a crime against man, which no human enactment nor usage can make right; and that Christianity humanity, and patriotism, alike demand its abolition."[6] The Fugitive Slave Act of 1850 was denounced as "repugnant to the Constitution, to the principles of the common law, to the spirit of Christianity, and to the sentiments of the civilized world," and its binding force was denied. This was a species of party nullification. But it was not until 1864 that the Republican Party branded the institution of slavery as a "gigantic evil" and demanded its complete extirpation

[5] Porter, *op. cit.*, 13.
[6] *Op. cit.*, p. 33.

from the soil of the Republic. Shortly after the Civil War the Prohibitionists swung into action with a full complement of issues touching the suppression of the liquor traffic, the civil service, direct election of President, Vice-President and United States Senators, sound currency, postage rates, transportation, and communication, public revenues, and woman suffrage. Later they added polygamy, the social evil, the Christian Sabbath, the Bible in the public schools, separation of church and state, together with international arbitration. Obviously they had no intention of being left without a political issue, if perchance some of their planks were enacted into law. A small group of prohibitionists split off from the main party in 1884 and injected a little theology and equalitarianism of their own into the platform. They held "that ours is a Christian and not a heathen Nation, and that the God of the Christian Scriptures is the author of civil government." Also they wished to extend the equality of the post-war amendments to Indians and Chinese. Such a platform is a sort of political *potpourri,* eminently satisfactory to those who draw it up, but affecting only slightly the current of public thought in the country at large.

Anti-foreign feeling has possibilities from the angle of vote-getting. The Federalists struck at French influence on American soil through the Alien and Sedition Acts, and the Virginia statesmen struck back through the Kentucky and Virginia Resolutions. The broad nationalism of American life was early expressed in sympathy for the oppressed of all nations and an invitation to find here an asylum from the tyranny of Old-World monarchies; but with the coming of immigrants a certain amount of friction developed resulting in fear of the alien, dislike for the competition of cheap labor, and a dread of foreign spiritual domination. This sense of uneasiness and of provincialism found expression in the "Know-Nothing" movement of the 'fifties. The slogan of the Native American Party of 1856 was *Americans must rule America.* They wished to confine the suffrage and the holding of public office to native-born Americans or those who had been naturalized according to the laws of the United States. A residence of twenty-one years, they thought, should be required for naturalization. They opposed any union of church and state, and all interference with religious faith and worship. In 1888 a recrudescence of Know-Nothingism appeared in the American Party, which demanded a passport fee of $100 for aliens and high educational qualifications for the suffrage, including ability to read the written or printed Constitution of the United States in the English language and write one's

name, together with the total exclusion of alien voting. A similar sentiment has appeared in our time associated with the Ku Klux Klan. The Republican platform of 1920 contains a declaration to the effect that aliens in the United States are not entitled to liberty or agitation directed against the government or American institutions. In general it would seem that the opposition to alien suffrage which has been one of the cardinal principles of Americanism, in a party sense, is well founded, as is shown by the fact that the states in which aliens could vote steadily decreased in number from seventeen in 1888 to none at present. "Americanism" has, then, served a useful purpose. Especially in time of war is the practice of permitting aliens to vote both unwise and dangerous.

Economic issues such as currency reform, the tariff, public lands, agriculture, labor and capital, have claimed their share of public attention. As early as 1872 the Labor Reform Party was demanding "a purely national circulating medium based on the faith and resources of the nation, issued directly to the people without the intervention of any system of banking corporations."[7] By 1876 the cause of monetary reform was espoused by the Independent (Greenback) Party, successor to the Labor Reform Party. The first plank in its platform was the repeal of the Specie-Resumption act of January 14, 1875. Second, it advocated the issuing of United States notes, to circulate as full legal-tender except for the payment of obligations where gold was stipulated in the contract. This was regarded as being in harmony with the teaching of Jefferson that "bank paper must be suppressed and the circulation restored to the nation, to whom it belongs." The Greenback Party of 1888 reiterated in substance these demands, laying down the premise "that the right to make and issue money is a sovereign power to be maintained by the people for the common benefit. The delegation of this right to corporations is a surrender of the central attribute of sovereignty, (void) of constitutional sanction, conferring upon a subordinate and irresponsible power absolute dominion over industry and commerce."[8] Agitation for currency reform increased rapidly until it came to a head in 1896, when the old-line parties were split wide open by the free silver issue. The Democrats declared for the free and unlimited coinage of silver and gold at the legal ratio of 16 to 1. This produced schism in their ranks, a faction breaking off to rally around the gold standard. The regular Republicans devoted one short paragraph to the money

[7] *Op. cit.*, p. 75.
[8] *Op. cit.*, p. 102.

question, standing for sound money and opposing the free coinage of silver. The major portion of the platform they gave over to the tariff and miscellaneous matters. The National Silver Party, composed largely of Republicans, came out for the free coinage of silver. So the campaign had to be fought out on the money question, despite the wish of Republican leaders.

The tariff is a perennial political issue. From the days of nullification in South Carolina to the present time the major parties have wrangled over "tariff for protection" and "tariff for revenue only." The aid of the Constitution has been invoked for and against the protective principle. Nullification reared its head in protest against protective tariffs, and even today the party in opposition seems to find little else upon which to wage a campaign. A complete statement of the Republican position is to be found in their platform of 1884: "We, therefore, demand that the imposition of duties on foreign imports shall be made, not 'for revenue only,' but that in raising the requisite revenues for the government, such duties shall be so levied as to afford security to our diversified industries and protection to the rights and wages of the laborer; to the end that active and intelligent labor, as well as capital, may have its just reward, and the laboring man his full share in the national prosperity."[9] This is an adroit statement of protection framed for the purpose of attracting the labor vote and preventing it from gravitating to socialism. Little is said about capital, because there was need to say little; much is said about labor, perhaps because the need was great. The principle that the public lands of the United States belong to the people and should not be sold to individuals or granted to corporations, but should be reserved as a trust for the nation, granted free of cost in limited quantities to homesteaders, appears in different forms in party declarations. Agrarian movements have given rise to demands for government aid to agriculture. The Anti-Monopoly Party of 1884 deprecates, in its platform, the "discrimination of American legislation against the greatest of American industries—agriculture, by which it has been deprived of nearly all beneficial legislation while forced to bear the brunt of taxation."[10] Farm blocs and third-party movements in the Middle West serve to keep every administration alive to the necessity of looking after the rights and interests of the American farmer.

Relations between labor and capital are freely touched upon in

[9] *Op. cit.*, pp. 132–33.
[10] *Ibid.*, p. 116.

party platforms. The increase of the labor supply by immigration is a matter of importance to political leaders. About the middle of the nineteenth century both major parties vied with each other in welcoming to our shores foreign immigrants, proclaiming from the housetops that America was the land of liberty and an asylum for the oppressed of all nations. By 1880, however, the Republicans, Democrats, and Greenbackers were agreed that America was not the proper place for the oppressed of China, and demanded abrogation or amendment of the Burlingame Treaty. The Democratic platform of 1924 re-affirms the established position of the party in favor of the exclusion of Asiatic immigration. The Republican platform of the same year issues a warning against mass immigration as a danger to citizens and aliens alike; it defends selective immigration, and advocates education of aliens in American customs, ideals, and standards of living, and in the English language. Thus by the force of events, notably by the upheaval wrought by the Great War, American immigration policy has shifted from the broad tolerance of the middle of the nineteenth century to the restrictive and selective policy of the present. Labor as an economic group has at times made its demands vocal through sporadic party efforts, but a labor party has never got a permanent foothold on American soil. Workingmen in the United States do not form a class apart as they do on the continent of Europe, and therefore they have no class-consciousness in politics, at least not enough to support an independent party. They are absorbed by other parties, Socialists, Republicans, Democrats, and minor parties. The arbitrary use of the writ of injunction and contempt proceedings as a violation of the fundamental American right of trial by jury was condemned by the Independence Party of 1908, as well as by socialist parties generally. As regards capitalism, trusts and "giant monopolies" are denounced by minor and opposition parties. In 1884 an Anti-Monopoly Party appeared, nominating the same candidates as the Greenbackers. It flayed large aggregations of capital for their "impoverishment of labor, the crushing out of healthful competition, and the destruction of business security."[11] About 1900, when "trusts" were being formed on a large scale, party platform-makers focused their attention on these. The Democrats declared, "Private monopolies are indefensible and intolerable. They destroy competition, control the price of all material, and of the finished product, thus robbing both producer and consumer. They lessen the employment of labor, and arbitrarily fix the terms and conditions thereof; and

[11] Porter, *op. cit.*, p. 115.

deprive individual energy and small capital of their opportunity of betterment." [12] Radical parties go the full length of collective ownership and democratic management of all large-scale production.

It would be singular indeed if among so many demands for reform, moral, economic and industrial, there should be no demand for a remodeling of the political order. There have been many such demands voiced through party platforms. All parties, indeed, have made suggestions looking to the improvement of political processes. Radical parties have made radical suggestions, which have become less radical with the passing of the years, until finally some of them have been espoused by the major parties, and embodied in law. They range all the way from the universal and equal right of suffrage, to the abolition of the Presidency, Vice-Presidency, and Senate of the United States. In 1896 the Populists came out for the election of the President, Vice-President and United States Senators by direct vote of the people. In 1900 the Democrats took a short step toward popular government, favoring the election of United States Senators by direct vote of the people and direct legislation wherever possible. In 1912 they declared for the presidential primary. It was the progressive drive of Theodore Roosevelt in 1912 that smoked out conservatism everywhere. He focused his attack on invisible government, and for the purpose of making government visible he favored many devices of popular control, such as presidential primaries, direct primaries, direct election of United States Senators, the initiative, referendum and recall, including the recall of judicial decisions, and equal suffrage. That shock jarred the doors of the Republican Party loose sufficiently to admit woman suffrage in 1916, and principles of social welfare in 1920. In 1924 Senator La Follette attempted a revival of Progressivism, centered around an attack on what he termed "judicial veto," but his efforts were unsuccessful.

A political reform that had to do with enlarging the electorate was woman suffrage. As far back as 1872 the Prohibition Party was insisting that sex or nationality should be a bar to suffrage no more than color, race, or formal social condition; and that the right to vote inheres in the nature of man. It would seem that the Prohibitionists had in mind amending the Fifteenth Amendment by adding the words "sex" and "nationality." Fifty years later the same effect was obtained through the passage of the Nineteenth Amendment. Woman suffrage was endorsed in the platforms of 1920 by the Democrats, Republicans, Prohibitionists, Farmer-Laborites, and Socialists,

[12] *Ibid.*, p. 213.

which is convincing proof that a reform championed by a small third-party in the beginning can so increase in popular favor as to force the large parties to take it up. When this particular reform acquired vote-getting potentialities, all parties were in haste to capture it. Thus at least three cardinal principles of the Prohibitionists of 1872 have been embodied in constitutional amendments: suppression of the liquor traffic, equal suffrage, and direct election of United States Senators. That is doing well for a minor party in the course of fifty years. The reasons for equal suffrage need not detain us. Viscount Bryce attributed the spread of the doctrine of equal suffrage to the revival of the natural rights philosophy. Doubtless the upheaval in Europe which began in 1914, and which necessitated calling upon the full national reserve in every country, including the ability and resources of women, contributed toward the acceleration of the movement for woman suffrage. All who helped in winning the war felt themselves entitled to share in a new way the rights and privileges of the democracies which they had saved from destruction.

An amazingly large place, on the whole, has been reserved for foreign affairs in party platforms, increasing in extent, of course, with the Spanish-American War and the World War. From home-rule in Ireland to the League of Nations, including protests against foreign oppression, sympathy for the Boers of South Africa, re-affirmation of the Monroe Doctrine, defense of the Open Door in China, imperialism—in fact the entire range of American diplomacy is treated in platforms, by way of praise or blame. The Whigs in 1852 planted themselves squarely on the position of George Washington and James Monroe in regard to entangling alliances. In 1856 the Democrats proclaimed the doctrine of parity between foreign and domestic policies, and said: "The time has come for the people of the United States to declare themselves in favor of free seas and progressive free trade throughout the world, and, by solemn manifestations, to place their moral influence at the side of their successful example."[13] Four years later the same party declared in favor of the acquisition of Cuba on terms honorable to ourselves and just to Cuba. The attempt made, in 1864, by Maximilian to set up a monarchy in Mexico was denounced by the Republicans, who said they would "view with extreme jealousy, as menacing the peace and independence of their own country, the efforts of any such power to obtain new footholds for Monarchical Government, sustained by foreign military force, in near

[13] Porter, *op. cit.*, pp. 45–46.

proximity to the United States."[14] In 1896 the Populists favored the recognition of Cuba as a free and independent state. The cause of international arbitration has been espoused. Solicitude for the protection of naturalized American citizens abroad has found expression in party utterances. An American continental policy based upon close relations between the United States and Central and South America, or pan-Americanism, was advocated by the Democrats in 1884. The World War did open a "new day of international relationships," as the Democrats said in 1916. The Republican platform of that year committed the party to nothing but a "firm, consistent, and courageous foreign policy, always maintained by Republican Presidents." With another turn of the wheel, in 1920, the Democrats had committed themselves to the League of Nations "as the surest, if not the only, practicable means of maintaining the permanent peace of the world and terminating the insufferable burden of great military and naval establishments."[15] The Prohibition Party took the same stand, with this explanation: "The time is past when the United States can hold aloof from the affairs of the world. Such course is short-sighted and only invites disaster."[16] The Republicans devoted considerable space to foreign relations, but were careful not to commit themselves to anything very definite. They said: "Subject to a due regard for our international obligations, we should leave our country free to develop its civilization along lines most conducive to the happiness and welfare of its people, and to cast its influence on the side of justice and right should occasion require."[17] The President was blamed for the refusal of the Senate to ratify the Treaty of Versailles. The section on the League of Nations concluded as follows: "And we pledge the coming Republican administration to such agreement with the other nations of the world as shall meet the full duty of America to civilization and humanity, in accordance with American ideals, and without surrendering the right of the American people to exercise its judgment and its power in favor of justice and peace."[18] This is an excellent example of how issues can be met without definite commitments—or should it be said that an issue full of high-explosives was adroitly smothered in words?

Thus it appears that parties have divided on a wide variety of issues.

[14] *Ibid.*, p. 63.
[15] Porter, *op. cit.*, p. 414.
[16] *Ibid.*, p. 443.
[17] *Ibid.*, p. 449.
[18] *Ibid.*, p. 452.

Some moral crusaders, aflame with a holy zeal for the welfare of mankind, have gone forth to do battle for the right. No materialistic motive stained the purity of their purpose. They acted in political matters from conviction, with little regard for economic interest. Opposition to slavery in this country, while linked with economic and constitutional considerations, was not without its idealistic appeal. The abstract ideals of liberty and equality meant more to the abolitionists than all the speculations of constitutional lawyers or the economic demands of free labor that the competition of slave-labor be abolished. Opposition to the liquor traffic has been motivated by something more than a desire to get more work out of employees or to cut down the expense of caring for the wreckage. From this angle it may be said that political parties do exist for the good of the commonwealth as a whole, and not for the good of any group. At the opposite extreme, however, stand those who advocate economic measures because of the economic advantage they will bring to some group, industrial or territorial. It has been said that the tariff is a local question. Attitude toward the tariff is determined on the part of any sectional or industrial group by what is thought to be the best interest of that particular section or class. From this standpoint parties may be said to represent the peculiar good of those who enroll under their banners. The United States has been divided into twelve political sections, and a more or less definite correlation has been established between them and party affiliations. They are as follows: The New England states, the Metropolitan states, Pennsylvania, the Central states, the North Central states, the West Central states, the Eastern border states, the other Upper South Atlantic states, the South Central states, the Lower South, the Mountain states, and the Pacific states. Some of these areas have been consistently Republican throughout the years, others just as consistently Democratic; and still others wavering in their allegiance, identifying themselves now with one party, now with another, or starting third-party movements. The rural, semi-urban, and urban or metropolitan character of a given group has a bearing on its political complexion.[19]

IV. Economic Interpretation

With the modern drift toward an economic interpretation of life, it is but natural that political processes should be explained in terms of exchange values. Political opinions, even convictions in politics, are reduced to economic formulæ. Whatever has been done, from the

[19] See Arthur N. Holcombe, *The Political Parties of To-day* (1924), p. 105 ff.

adoption of the Constitution to America's entrance into the World War, is regarded as the result of a certain economic determinism, which has its roots in economic good. Professor Charles A. Beard has identified his name with the doctrine that politics rests primarily upon an economic basis. He attempts to prove his thesis from the writings of political philosophers, from the place of group interests in the state, and from the vacuity of all political theory which denies or neglects sectional or class interests for the abstract rights of man. In two solid volumes he comes to grips with the perplexing questions involved in the making of the Constitution and the rise of Jeffersonian Democracy. As regards the framing of the Constitution, Professor Beard interprets the origin of the idea and the carrying of it through to successful completion in the light of the protection of property. Thus the Constitution is essentially a product of economic forces; it was put together by certain active interest-groups, composed of men who had a personal and financial stake in its outcome. He concludes as follows: "The members of the Philadelphia Convention which drafted the Constitution were, with a few exceptions, immediately, directly, and personally interested in, and derived economic advantages from, the establishment of the new system."[20] Once the Constitution was adopted and the new system set in motion, party lines began to appear, the result of a conflict between capitalistic and agrarian interests. The Federalists represented the moneyed aristocracy, while the Republicans represented the agrarian masses led by a slave-owning aristocracy. The success of the latter in 1800 meant the theoretical "repudiation of the right to use the Government for the benefit of any capitalistic groups, fiscal, banking, or manufacturing."[21] Such is Professor Beard's interpretation of the Constitution and of Jeffersonian Democracy. Its very simplicity is attractive, in that it permits of a certain mathematical precision in reducing all political processes to economic formulæ. It goes far toward making politics a science. But it may go too far. Political motives are complex. It is difficult to determine just what was going on in the minds of the men who made the Constitution. Certainly it requires a wrench of the imagination to conceive of George Washington, who had served his country faithfully and well, and without thought of remuneration, signing the Constitution because it would enhance the value of his public securities. Doubtless he was not unmindful of the protection that would be afforded by

[20] *An Economic Interpretation of the Constitution of the United States* (1919), p. 324.

[21] *Economic Origins of Jeffersonian Democracy* (1915), p. 467.

the new national government to his property and the property of others. Assuming that the framers did derive economic advantage from the work of their hands, did not the entire country derive economic advantage therefrom? The financial system of Hamilton, based upon the Constitution, revived the failing sources of public credit, which certainly was a public good. If the economic advantages of the Constitution be broadened sufficiently they will be almost coextensive with national ideals, such as defense, order, justice, and welfare. The suggestion of Professor Beard, amounting almost to innuendo, that the framers of the Constitution were narrowly intent upon their own economic good, is difficult to reconcile with the known public services of men like George Washington, Benjamin Franklin, and James Madison.

V. Political Psychology

In the last analysis much depends upon one's own political psychology, in the interpretation of political processes. If one is an idealist one will find idealism in politics, for it is not totally wanting; whereas if one is a realist one will find realism, for it too is not wanting. To the man of a practical turn of mind every political issue has back of it some common-sense business motive. The foreign wars in which the United States has engaged have brought her independence, freedom of trade, and territorial expansion. There are some ultra-realistic persons who believe that the United States entered the World War to safeguard her investments in Europe. But there is more to national policy both at home and abroad than profitable investments. There is a spirit of the people that is something different from geography, race, language, and forms of government. It is a matter of tradition, an attitude toward life. American traditions are built upon the solid foundation of rich natural resources, a detached and distant situation as regards Europe, an advancing frontier, cheap land and individual initiative which characterizes new and democratic countries. Conditions have changed, it is true, and a change in national traits may be looked for, but the same love of liberty which characterized all who have sought the shores of America as an asylum from oppression, the same love of equality which abolished primogeniture, the Established Church and discriminatory qualifications for voting, and the same respect for the sanctity of private property which characterizes Anglo-Saxon civilization everywhere, still persist in the United States and crop out in unexpected places. They find expression in domestic policies and in international relations. Even parties, in the heat of political

rivalry and platform-making, reach levels of national consciousness that are exalted and idealistic. Theodore Roosevelt wrote in the Progressive platform of 1912: "Political parties exist to secure responsible government and to execute the will of the people." One may be forgiven for doubting that they have always measured up to this high standard, but for nearly one hundred and fifty years America has been governed through the medium of parties; and while mistakes have been made, while the lower levels of realism have at times been touched, the general level has been high. Provincialism has given way before a broad nationalism, and in the new day of "international relationships" America has ideals and traditions which will make for a more stable, a more enlightened, and a more peaceful world.

READING NOTES

A frank recognition of the place of the political party in American constitutional development is to be found in *The Rise and Growth of American Politics* (1898) by Henry Jones Ford. An excellent historical account of the succession of political parties in the United States is contained in *The Evolution of American Political Parties* (1924), by Edgar E. Robinson. For a rapid survey of party origins and political development, *The Irresistible Movement of Democracy* (1923), by John Simpson Penman, chapters I–VIII, is useful. The best analysis of the underlying causes of party cleavages, authenticated by a sketch of the rise of existing national parties, is the work of Arthur N. Holcombe in *The Political Parties of To-Day* (1924). Professor Holcombe has made an original and praiseworthy contribution to our knowledge of political behavior.

For general works of party development reference should be made to J. S. Bassett, *The Federalist System* (1906), Edward Channing, *The Jeffersonian System* (1905), William MacDonald, *Jacksonian Democracy* (1906), and Max Farrand, *The Fathers of the Constitution* (1921). Charles A. Beard, *Economic Origins of Jeffersonian Democracy* (1915), and W. A. Robinson, *Jeffersonian Democracy in New England* (1916), represent special studies in the field of party origins and growth. A valuable study in the history and theory of political parties is to be found in Anson D. Morse's collected papers, published under the title *Parties and Party Leaders* (1923).

A convenient collection of party principles has been made by Kirk H. Porter in *National Party Platforms* (1924), to be published in a new edition every four years in order to include current material. A collection of state party principles can be found in *Platforms of Political Parties in Texas* (1916), by Ernest W. Winkler. The student should not neglect to examine the campaign text-books issued every four years by the leading parties for the purpose of spreading information, propagandizing their principles, and getting out the vote.

CHAPTER XII

THE CITIZEN AND HIS PARTY

The outstanding feature of party development in the United States within the last quarter of a century has been the gradual assimilation of the party system to the state itself. At first purely voluntary associations, parties have come to have a basis in statutes; definitions of what constitutes a party are found in law; party allegiance is being narrowed by the closed primary to a point where it is about as exclusive as that claimed by the state itself, an oath of party loyalty being not uncommon in election laws; a change of party allegiance is possible through certain formalities suggestive of expatriation; and finally the federal idea is freely extended to party organization. A state within a state is growing up. And therein lies the danger of invisible government. If this second and subordinate "state" be completely visible, with all its processes known and regulated by law, it can be made an effective aid to good government; but if it works under cover and for ends inconsistent with the public good, it must be sought out and destroyed. Invisible government is an oligarchy in a democracy. Theodore Roosevelt directed the shafts of Progressivism at one mark, which curiously enough was invisible, namely, sinister and corrupt party control. He hoped to draw out into the light of publicity and make serviceable to the people, the processes of democratic government, i. e., nomination, election, legislation, execution of law and even its interpretation by judicial tribunals. Because he failed of election, it is generally assumed that he failed to reach his goal; but in a larger sense his success was conspicuous. Working from within he pried open the doors of conservatism, which have never since closed so tightly as before. Changes in American political processes must come with time, but the enlightened citizenry of America will never again tolerate an *imperium in imperio,* in the form of invisible government.

The federal form of party organization is what strikes one at the first glance. The system devised by the Fathers to meet the needs of the thirteen colonies has not only endured for well-nigh a century and a half, but it has been adopted by voluntary associations, as polit-

ical parties were at first, and made to serve their ends. So we live under two federal systems, one found in the Constitution of the United States, the other, extra-constitutional, the product of usage and custom. The one Constitution is written and formal; the other began as unwritten and informal, but with the passing years has tended to become crystallized in legal enactments. National political parties have as yet no status in law. They are not defined, nor is their procedure regulated, except as to the time of elections and the amount of campaign expenses. But in state election laws political parties are defined and regulated. Of course, it was to be expected that the states would be forward in this regard, since the Constitution of the United States leaves to them the regulation of the electoral process. Party organization is built sometimes upon the idea of a federal hierarchy. The voters of a ward or precinct choose a member of the county committee; the various county committees throughout the state choose each a member of the state central committee; and each state delegation to the national convention chooses one or more members of the National Committee. Thus the chairman of the National Committee has his finger on the pulse of the entire party organization. In 1900 the chairman of the Democratic National Committee selected a special representative in each of about 30,000 election precincts in doubtful states. They were found to be more effective in distributing campaign material and canvassing voters than the county and local committees.[1] This federal party system is a vast network of communication not unlike the human brain with its complex ramifications of receiving and sending apparatus. Not at all times is the contact between the national and the precinct committees direct and vital, but on occasion it is always possible to galvanize it into life. Political parties are like machines, with a close inter-relation of parts, wheels within wheels, and all operating at the touch of one hand. Senator Quay, "boss" of Pennsylvania, once refused to permit the Republican candidate for mayor of Pittsburgh to be elected until certain political matters were adjusted to his liking. From the standpoint of good government all depends upon how the machine is operated, and for what purposes. If the wheels go around in the interest of individuals or private corporations within the state and not in the interest of the state itself, then party machinery is being misused. If, on the other hand, the political machinery of parties is used to bring forward able candidates, to define and clarify public

[1] P. Orman Ray, *An Introduction to Political Parties and Practical Politics* (1922 rev. ed.), pp. 251–52.

issues, to sponsor them before the country, to get out the vote, and in the event of success at the polls to govern the country as responsible trustees of public power, then the government of men through parties becomes of equal importance with the government of laws under the Constitution.

I. The Committee System

Congressional government has been described as "government by committees," and the description is no less apt when applied to political parties. The committee form seems to be indigenous in America and suited to a new country lacking in traditions, as is seen in the rapid and spontaneous growth of Committees of Correspondence in the unsettled days prior to the Revolution, in the number and importance of committes in the Constitutional Convention, in the standing committees of Congress, and in the committee system of party organization. The smallest party unit represented by a committee varies with different sections of the country, and with the rural or urban character of the population. There is no hard and fast rule about such matters. Villages and townships have their committees. Senatorial and congressional districts, wards, precincts, and even school districts, are used as bases of party organization. As the election laws of California reflect progressive thought on the legal regulation of parties, some examples will be drawn from them. Elaborate provision is made for the composition of the county committee. In any city and county containing more than ten assembly districts the county central committee is elected by each assembly district, and consists of five members from each assembly district. In all counties containing five or more assembly districts the county central committee is elected on the basis of one member for each seven hundred votes or fraction thereof cast for such party's candidate for governor at the last general election. In counties containing less than five assembly districts the central committee is elected by supervisor districts, as follows: "The number of votes cast in such supervisor district for such party's candidate for governor at the last general election at which such governor was elected shall be divided by one-twentieth of the number of votes cast for such governor in such county; and the integer next larger than the quotient obtained by such division shall constitute the number of members of the county central committee to be elected by such party in said supervisor district."[2]

[2] *General Election Laws of California* (1926), p. 142.

This example is given not so much for enlightenment in regard to method, as to make plain the detail into which it is possible to go in statutory regulation of party organization. In the State of Washington the procedure is much simpler. At the September primary each voter may write on the ballot the name of a qualified elector of the precinct for member of the party county committee. The county central committee is composed of the precinct committeemen elected at the primary. These two examples serve to illustrate the extremes to which statutes may go in such matters. The California law is elaborate and minute in providing for the county committee, whereas the Washington statute disposes of the subject in a few lines. The one employs assembly districts and supervisor districts as its units of representation, and takes into account party voting strength; the other employs the precinct, and fixes the ratio at one member for each precinct.

Likewise methods of forming the state central committee differ. In California the candidates nominated by one party at a primary election, both state and national, together with delegates from senatorial districts, and hold-over senators, meet in convention where they formulate the state party platform and elect the state central committee, consisting of three members from each congressional district, which holds office until a new state central committee is elected. An executive committee is selected by the main committee, and officers are chosen. In Washington the state central committee is formed from below on the federal plan. It consists of one committeeman from each county, elected by county committees. The California plan is reminiscent of former days when the convention was a prominent feature of party organization; the Washington plan reflects the influence of direct primaries, the conviction that all party committees must be formed from below by vote of the people in the first instance in order that they may be kept responsive to the people's will. It represents an attempt to democratize party control. The California statute provides for an intermediate committee not found in Washington. The executive committee of the state central committee of each political party, in conjunction with each nominee for congress affiliated with such party, selects a congressional committee for the district in which such nominee is a candidate. The minimum is fixed at fifteen members and the maximum at thirty-five members. It is the duty of this intermediate committee to take charge of the campaign of such nominee and conduct it subject to the supervision of the state central committee. This is an attempt to tie together the Congressional

Committee at Washington, D. C., and the state congressional districts. It is an acknowledgment that candidates for national office need more attention in a campaign than state and county committees can give them. This gives California a three-level hierarchy of committees, county, district and state, not to mention local organizations. They represent an elaborate and complex network of organizations for the purpose of formulating party policies, bringing forward public issues, waging campaigns of education, and finally getting out the vote. The actual nominating of candidates is reserved for the people through direct primaries.

The state central committee occupies the same relative position in state politics as the national committee occupies in national politics. It determines formally the policy of the party; it calls and arranges for the state convention, fixing the ratio of representation where it is not regulated by law; it carries on state campaigns, raising money, distributing printed matter, sending out speakers, and doing whatever is deemed necessary to elect its candidates to office. The organization of the state committee is simple—a chairman, sometimes a number of vice-chairmen, a secretary, and a treasurer. The number and character of its sub-committees are determined by the work which it has to do. For the purpose of raising funds a finance committee is usually deemed necessary. In the interim between state conventions considerable power is lodged in the hands of an executive committee, but it was held by the Republicans in the State of Washington that the executive committee did not have authority to call a state convention, and so the entire committee was assembled to pass upon the question. Power may be lodged in a central committee to fill vacancies among the ranks of the delegates to a state convention, owing to failure on the part of candidates to file nomination papers, to declare party affiliations, or in the event of death. Of course, the driving-power back of state committees may be and often is the party caucus. There the real policies of the party are determined. Informal "steering committees" appear in counties, and a gathering of like minds precedes every important meeting of the state central committee. In case of schism in the party, an entirely new set of party machinery may be created to meet an emergency, consisting of a state-wide campaign committee, a ways and means committee charged with the raising of funds, and a steering committee to carry the work of organization down into the precincts. Thus if parties may be said to have their "written constitution" because of statutory regulations, they may also be said to have their "unwritten constitution," formed

by usages and practices which have grown up beside formal enactments. Working units are formed spontaneously, entirely apart from statutes, to speed up the drive of a campaign and to deliver the vote.

The duties of committees found on the lower levels of the party hierarchy, such as county, township, city, ward, and precinct, are not clearly defined. In some cases they may exercise a certain amount of appointive power, filling vacancies among delegates to conventions. In general they call local conventions, determine the policy of local organizations and carry on local campaigns. Important officials of this group are the county chairman and the precinct captain. Where the state central committee consists of one member from each county, on the federal plan, elected by county conventions, the county chairman has a direct share in determining state party policies. On the other hand, where the state committee is chosen by the state convention, the influence of the county chairman is not so marked. County committees and county conventions are important wheels in the party machinery; and the one who engineers their movements is the county chairman. The precinct committeeman or captain serves as a *liaison* officer between the party organization and the local community. He has his local committee to aid him, and it is here, in these small party units, that the real contest actually begins. When a new political alignment takes shape as the result of party strife, there is keen rivalry for the capture of precincts. It is the duty of the precinct captain to cultivate the friendship of the individual voter, and to that end he employs all the arts known to the politician, seeking employment for those out of work, caring for the needs of the poor, interesting young voters, and influencing public opinion in favor of his party. Precinct committeeman is a key-position, and calls for political talents of no mean order. He it is who feeds the hopper of the party mill. If there is a shortage of grist, he is to blame; if the hopper is full, he receives the praise.

With the advent of the direct primary, the character and functions of the state convention underwent a radical change. In the old days conventions nominated candidates, named delegates to the national convention, and brought forward measures; but when the people took over the nominating process and began to take a hand in legislation, by way of initiative and referendum, little was left for the convention, except to nominate presidential electors and piece together the various platforms of the successful candidates. In some states, fifteen in number in 1924, the people choose their delegates to the national convention and express a preference for President. This lops off an-

other important function of the state convention of former times. So it has been stripped of its powers and prerogatives, one by one, until it is little more than a ratifying body, especially in those states where the candidates chosen in the primary dominate the convention and draw up the platform. When a political fight is on in a state, the convention may prove to be decisive in the shaping of party policy. It may mark a parting of the ways between those who stand with the administration and those who oppose it. In such an event there is bound to be keen competition for the capture of the resolutions committee which is charged with bringing in a statement of party principles. In case disapproval of the administration finds a place in the platform, the result may be a split in the party, an anti-administration faction setting itself up against those in power, and carrying the fight to the people at the polls. The issues in such contests are usually of state-wide application only, such as highway construction, education, reclamation, and religious questions. Candidates for national office, however, must have a wider base than local issues upon which to stand. Therefore, candidates for Senator and Representative fall back upon their respective national platforms for a statement of the principles which they espouse. Thus the stream of state politics is bifurcated, one branch flowing in the direction of local issues, the other flowing in the direction of national issues. State party issues are not stable. They emerge out of the growing life of the commonwealth. There are no fundamental party policies to maintain, such as the tariff or the doctrine of state-rights. States might get along very well without national parties, Republican and Democratic, were it not that the people of the several states vote for United States Senators, Representatives, and indirectly for the President and Vice-President. So long as they do that, national parties will always hold a prominent place in state politics.

The apex of the party pyramid is the national committee. The original Republican Committee of 1856 was a self-constituted body. The chairmen of the state Republican committees of nine states signed a call for an informal convention at Pittsburgh, Pennsylvania. The convention assembled and chose an executive committee consisting of one member for each state represented, and it was that committee which later in the year issued a call for a national convention to be held in Philadelphia.[3] Little change has taken place since. The size of the national committee has increased with the growth of the Union and with the advent of woman suffrage. Each state and territory is

[3] Jesse Macy, *Party Organization and Machinery* (1904), pp. 67–68.

represented on the national committee by two members, a man and a woman, usually named by the state delegations to the national convention. The District of Columbia, Alaska, Hawaii, Porto Rico, and the Philippine Islands have representation; and the Democrats include the Canal Zone. However, the Republicans of Alaska failed to name their representatives in the convention of 1924. Thus the Democratic National Committee numbers normally 108, and the Republican, 106. It is the task of the national committee to arrange for the meeting of the national convention, to plan its organization, to make out a temporary roll, select a list of temporary officers, and have a hand in making up the committees of organization. When the party is a unit the arrangements of the national committee are accepted by the convention without question and put into effect as planned; but in the event of internal dissension in the party, the committee itself may be divided, bringing in a majority and a minority report on organization, leaving it to the convention to decide. The new national committee named at the convention takes up the work of the ensuing presidential campaign under the leadership of a chairman chosen by the presidential candidate or acceptable to him. During the years of comparative inaction, national committees seek to iron out party differences, to promote greater coöperation among all factions, and to serve as a connecting link between the national administration and state politics, without actively interfering anywhere.

There still remains one other important committee in the hierarchy of party organization, namely, the Congressional Committee. As the successor of the old Congressional Caucus, it acts as a sort of watchman on the political battlements at Washington, D. C., gathering information of how the campaign goes and making suggestions as to manœuvres. It exists to look after the political interests of the members of the Legislature. The Executive has his national committee. As early as 1866 the Republicans felt the need of some organization to coöperate with state organizations in the election of members of Congress, especially in doubtful states. The Congressional Committee drafts no formal platform, but it aids committees in states by issuing printed matter, supplying funds and sending speakers. In presidential years it is overshadowed by the national committee. But in the mid-term elections, the Congressional Committee takes on new life, while the national committee gives itself to watching. The Congressional Committee is reorganized every two years, after every election of the House of Representatives. The Republican committee consists of one member from each state having Republican representation

in Congress. The Democratic committee consists of one member from each state, regardless of Democratic representation and also one woman from each state represented in Congress.[4] The Republican committee is much smaller than the Democratic committee, on account of the number of states in which the Republicans cannot muster enough votes to send a member to Congress. The former numbers about thirty-five, the latter about one hundred. There is also a Senatorial Committee numbering seven members, appointed by the leader of the party in the Senate. It serves for four years, and has charge of the election of Senators.[5] There seems to be no well-defined relationship established between the Congressional and the National committees, time and circumstance determining what shall be done; but in general there is a spirit of coöperation permeating both of them. In presidential years the National Committee bears the brunt of the battle; in the "off years" the Congressional Committee takes charge and stands in the breach.

II. The National Convention

Perhaps the most colorful and dramatic episode in the whole range of American party activity is the meeting of the national convention. While the direct primary has done much to devitalize state conventions, making them little more than accessories after the fact, the national convention retains much of its original vigor. It is still the supreme governing body of the party, legislative, executive, and judicial. Even the presidential primary has not made serious inroads upon the traditions and procedure of the national convention. With surprisingly little change these quadrennial gatherings come and go much as they did in the beginning. There are the same contests over the seating of the delegates; the same spirited attacks upon certain planks in the platform, followed by the same spirited defense; the same putting forward of "native sons" as candidates on the first ballot, only to leave them nearly all behind when the time comes to concentrate on one or two likely candidates; the same desire to stampede the convention by organized noise-making. With the passing years some features have been accentuated, organization is more elaborate, and mechanical devices are more perfect, but in spirit and temper a national convention in 1926 is not unlike a national convention in 1856. Of course, when all the issues are decided in advance, when

[4] See Charles E. Merriam, *The American Party System* (1922), pp. 62–63.
[5] *Op. cit.*, p. 63.

there is no note of discord in party harmony, and when the candidates are singled out beforehand by party leaders more or less in obedience to public opinion, a national convention can be as tame as a Quaker meeting. But when some issue full of dramatic human interest is injected into the convention, the battle lines are tightly drawn, and the stream of eloquence flows on like a mighty torrent. Committeemen remain at work throughout the night, appearing on the floor of the convention the next morning pale and haggard, but as ready as ever to defend a stronghold or renew an attack. National conventions reveal the heartbeats of American democracy. They make and break public men. For more than a generation Democratic conventions made William Jennings Bryan the public man he was, but in his old age one of them came near breaking him. His speeches before the Democratic National Convention at New York, July, 1924, were prophetic of decline and eclipse.

It detracts from the glamour of national conventions to reduce to writing what actually takes place. The details are prosaic. The way is prepared by the National Committee, and the convention is called to order by the Chairman of that committee. After an invocation the temporary organization is effected. The order of procedure is not precisely the same in the two major parties, and, after all, the order is not important. Early in the first day's assembly the call for the convention must be read. The Chairman of the National Committee presents the name of the temporary chairman of the convention and a list of temporary officers. If there is no opposition, the acceptance of the nominations made by the National Committee through its Chairman is a mere formality. In fact one chairman forgot to call for a vote of the convention on the temporary officers, until his attention was drawn to the omission. The dramatic event of the first day is the sounding of the keynote of the convention by the temporary chairman. It is all the more dramatic when the convention is that of the party in opposition, because criticism of the administration is in place. Senator Pat Harrison of Mississippi made a striking keynote address before the Democratic Convention of 1924. From genial humor to biting irony he ran the entire gamut of human eloquence in describing the Republican administration, and when he had finished the members were unanimous in declaring that he had skilfully "unfolded the misdeeds of the Republican Party during the past four years." Rules governing the convention, usually some adaptation of the parliamentary rules of Congress, are adopted. Standing committees are selected, Credentials, Permanent Organization, Rules and Order

of Business, Platform and Resolutions, and a committee to notify the successful candidates for the Presidency and Vice-Presidency, together with the new National Committee. These committees, with the exception of the National Committee, are made up of one member from each state and territory, including the District of Columbia. The Democrats recognize the Canal Zone, but the Republicans have as yet not acknowledged the political importance of that region. On the second day the convention will hear the reports of standing committees, beginning with the Committee on Credentials which has the task of settling disputes over contested delegations. The temporary roll will be made permanent when these contests are disposed of. The report of the Committee on Permanent Organization carries the nomination of the permanent chairman and permanent list of officers, including a secretary, associate secretary, executive secretary, recording secretary, and a long list of assistant secretaries, also a parliamentarian and assistant, a sergeant-at-arms and assistant, executive officer, chief doorkeeper and his first assistant, and an official reporter. The permanent chairman is escorted to the platform by a committee, the same procedure as is followed in the case of the temporary chairman, and the convention will listen to a second address on the political situation of the country. The order of business varies. The Republicans tend to clear the decks for action, disposing of the platform, before presenting candidates, while the Democrats tend to sandwich in the presentation of candidates with platform-making. The three high levels of a national convention are the keynote speech, the adoption of the platform, and the presentation of the candidates, followed by balloting. The Democrats require a two-thirds majority to nominate, while the Republicans are content with a simple majority. The Democrats adhere in part to the unit rule in nominating, that is, the votes of any delegation are all cast for the candidate who polls a majority of the delegation. But much leeway is left to the individual state. In the Democratic convention of 1924, Iowa waived the unit rule on the Ku Klux Klan issue, on the ground that the question, being religious and not political, each delegate should be left free to follow his conscience. Other states abandoned the unit rule for one or more ballots.

Women have found a place in national party politics. They are chosen as delegates to national conventions; they coöperate with men on National Committees; and in conventions they are named on standing committees, although the more technical the committee is, the fewer women members it will have. They do well on nominating com-

mittees, and are usually found in numbers on the committee on permanent organization. The work of platform-making the men seem to feel is their prerogative, and they are not very ready to share it with women. But women are included among the officers of the convention, and sometimes offices are created for them, such as "Vice-Chairman." A long list of assistant secretaries, one from each state, provides a convenient method of honoring women. Women frequently second nominations, and occasionally a woman announces the vote of a delegation. They are also placed on committees to notify the successful candidates. It seems necessary that they serve some sort of apprenticeship in these matters, but they are learning rapidly. It may be expected that in the future the more important posts will be open to them. The competition of one major party with the other, each endeavoring to capture the woman's vote, is a wedge cleaving asunder old party conservatism.

III. Direct and Presidential Primaries

Before about 1900 the nominating process was bound up with party conventions. Hand-picked delegates, chosen and instructed by party caucuses, gathered in conventions and there went through the motions of naming candidates for office. Not infrequently they were mere puppets in the hands of the "organization," and the ticket selected in no way represented the mind of the people. The voters were given the option of electing one or the other of two equally bad candidates, but no choice whatever in selecting the candidates themselves. But with the rise of progressivism in politics this stronghold of invisible government was attacked. The nominating process was given back to the people, much as it was in the old days of the New England town-meeting. Or at least that was the intention. It was expected that the direct nomination of candidates would arouse new interest among the voters; that it would result in a higher type of public official; and that it would democratize party control. Graft and corruption, bribery and trickery, were to be eliminated from the nominating process. The movement was opposed by those who feared that the electorate might be too heavily burdened by numerous elections; that every political whim and fancy might be reflected by irresponsible candidates; that the expense would exclude from the primary all but the rich; and that party government with its unity and responsibility might be destroyed. The closed primary involves the declaration of party affiliation, and to that some voters object, claiming that

it is an invasion of the secrecy of the Australian ballot. It is also objected that bosses control the primaries just as they controlled the conventions. That neither the glowing promises of its friends nor the doleful warnings of its enemies have been verified, seems to be the one incontestable fact about the direct primary. It has contributed toward democratizing the function of nomination, and it has done something to break the power of the boss. The means are there if the people wish to use them. If, on the other hand, the people are content to have the direct primary captured by the "machine" and conducted in the interest of individuals and corporations, little can be done about it. No device is self-operating. The best that can be done is to make it easy to do right and hard to do wrong. But there is spreading a general feeling that the direct primary has burdened the electorate; that it has opened the flood-gates of propaganda; that it is expensive; and that it has not smashed the "machine," for there is nothing to prevent political organizations from canvassing for signatures, sponsoring the filing of nomination papers, and getting out the vote. In fact the more complicated the process is made, the more difficult it is for the individual who wishes to run independently to make headway. Organizations are fitted to take care of the details of the direct primary, and they have the money. Newspaper space needs to be purchased on a large scale to influence public opinion. Whereas formerly money was used secretly to swing elections, it is now used to manufacture public opinion, and swing the vote in a grand contest of propaganda. But on the whole something is gained by the attempt to bring the nominating process out into the light of day. Propaganda is education of a sort, and in time people will become more or less propaganda-proof. They will develop critical judgment in regard to newspaper articles and editorials, and printed matter of a thousand kinds. And even now evidence is not wanting that such a faculty is in the making. If the voters were called upon to choose only a few conspicuous public officials, those charged with policy-forming functions, leaving administrative officers to be appointed, it would serve to relieve the electorate of an unnecessary burden and enable it to act more intelligently. In brief, the direct primary will never have an opportunity to prove its worth or its deficiencies without the short ballot. Finally, a much needed reform is to make compulsory a declaration of party affiliation for candidates. It is anomalous that voters must declare their party affiliation to vote in the primaries, while candidates for office identify themselves with two or more parties.

Just as the direct primary was invoked to democratize state party

politics, so the presidential primary has been invoked to democratize the national convention and the nomination of the President and Vice-President. Delegates to state conventions are chosen by direct primaries in some states. Their election serves as a mandate from the people of the state as to what they shall do at the convention. In 1924 fifteen states had presidential primary laws, mandatory and optional. The object of these laws is to give the people something to say about the choice of delegates to the national convention, and about instructions as to how they shall vote. The people can at least express a preference. It is intended to take the nomination of President and Vice-President out of the hands of party bosses, and to make party government, even in the supreme governing body, in every way responsible. The wide diversity of practice among states using the presidential primary makes it difficult to describe the method in general terms. The Oregon ballot illustrates the complexity of the problem—the attempt to instruct delegates and yet leave them free to a certain extent.[6] For if every delegation to the national convention went with iron-clad instructions to vote for a certain candidate and for no other, from the beginning of the convention to the end, there might conceivably be no nomination at all. The Democrats with their two-thirds rule might be hopelessly deadlocked in every convention. There must be some leeway. On the Oregon ballot of 1924 a candidate for the position of delegate to the national convention states his preference, and usually adds that he will support the choice of the party at the primary. For example, one candidate says, "Prefer Hiram W. Johnson, but will support preferential choice of Republican primary." Another adds, "Oregon's Republican choice for President, my choice." "Vindicating the right of the Oregon voter to command his delegates" is the slogan of a third. Even good advice is handed out in small chunks, "Let's boost, not knock. Favor Coolidge, but will support the people's choice." Three candidates prefer to stand on the recommendation of the Oregon Republican Club alone. On the same ballot appear the names of Calvin Coolidge and Hiram W. Johnson as candidates for nomination, giving the people an opportunity to express their preference. Candidates for Vice-President and for presidential electors also appear. Under this system delegates to the national convention are instructed as to what they shall do, and are supposed to be bound by their instructions. It was held against Judge Wallace McCamant of Oregon that he had not voted for Hiram Johnson at the national convention, whereas he had been elected delegate

[6] See Louise Overacker, *The Presidential Primary* (1926), Appendix D.

in a preferential primary in which Johnson was the successful candidate. McCamant replied that he had made plain to the people of Oregon that he refused to be bound by the results of the primary election. It seems impossible to do more than express preferences at these primaries. Hard and fast mandates are out the question.

One obvious, although rather slight, advantage of the presidential preference primary is the elimination of the practice of presenting "native sons" as candidates. No candidate for the position of delegate to the national convention will pledge himself to vote for an inconspicuous citizen of his state who stands no chance of being nominated by the convention. Nor will a state express its preference for a "native son" unless he is of presidential timber. Candidates for Vice-President may be selected at random, and probably state pride will be fully gratified by naming a "native son" for the Vice-Presidency. On the whole, the presidential primary is one of the devices evolved to democratize party government, and it will stand or fall with the others. In recent years there has been a reaction against attempting too much in the way of direct nomination and direct legislation. Moreover, bosses have found ways of influencing direct and presidential primaries. Recommendation of a party organization seems to be sufficient in some presidential primaries. But even if primary laws are modified or repealed—and three states have repealed their presidential primary laws—a residuum of liberal and democratic ideas will be left, which will make it impossible ever to go back to the old machine-controlled and boss-ridden type of convention. The problem is to work out some plan whereby what is good in the convention system, *viz.*, a compact body of men and women with the immediate political situation before them, deliberating on policy and method and naming candidates for office, shall be combined with what is good in devices for democratizing party control. Pre-primary conventions have been devised with this in mind. They are a sort of party conference to prepare the way for an intelligent choice at the ensuing primary election. But such a device further multiplies the wheels within wheels, and can be little more than a caucus unless its members are elected by the people, which would add a *third* election. Apparently much work has yet to be done in the field of nominating methods.

IV. Party Finance

Political campaigns need financing as surely as military campaigns do. In fact the addition of more political machinery in the way of

primaries and direct legislation has increased the expense rather than lessened it. However, large expenditures of party funds are not *prima facie* evidence of corruption, for there are many legitimate objects which necessitate the collection and disbursement of large sums. With the increasing regulation by the state of party activity the whole matter of campaign funds has come in for its share of attention. Necessary expenses are set down in statutes; amounts to be spent are limited; the sources of party revenue are scrutinized and regulated; and finally provision is made for publicity in party finances. Among the legitimate objects of expense found in general election laws are the following: official filing fee, printing, circulating and verifying nomination papers, personal traveling expenses, rent and furnishing of rooms and halls for headquarters and meetings, payment of speakers and musicians and their traveling expenses, printing and distribution of pamphlets, circulars, newspapers, cards, handbills, posters and announcements, reasonable compensation of challengers at the polls, canvasses of voters, clerk hire, conveying infirm and disabled voters to and from the polls, and postage, expressage, telegraphing, and telephoning. Outlays for buttons, badges, armbands, flags, pennants, and other campaign paraphernalia, fall within lawful expenses. But payment of naturalization fees or poll taxes or spending money for treating is forbidden. Provision is made for verifying statements of all moneys contributed, disbursed or promised by candidates or other persons in their behalf. Some state statutes are quite general in their regulation of campaign expenditures, requiring only an itemized statement of money or things of value used for the purpose of securing or influencing nominations and elections. The sources of party income have been gone over by legislative bodies and abuses have been eliminated. Attention has been focused on newspapers. Statements of ownership must be filed, and in some states candidates cannot directly purchase space to present their views to the public. Persons other than the candidate may have articles inserted in newspapers under the label "Paid Advertisement."

Officeholders are expected to contribute to campaign funds, sometimes on a fixed scale relative to their salary. Candidates are glad to bear a part of the expense. Individuals who are interested in the party's future, either from personal or patriotic motives, contribute in proportion to their means. Corporations have been heavy contributors, sometimes to both major parties equally in order to make doubly sure of the country's welfare. But as the result of *exposés* which laid

bare the close connection between corporations and party politics, contributions from corporations have been regarded with some suspicion. The Federal Corrupt Practices Act of 1925 forbids national banks and corporations organized by authority of a law of Congress to make contributions, and any corporation to contribute to elections in which presidential electors, Senators or Representatives, Delegates or Resident Commissioners, are voted for. The act regulates what might be called interstate party activity, that is, political committees which seek to influence the election of candidates in two or more states, and also any branch of a national committee, association, or organization, even if it functions entirely within a state. Such political committees are required to have a chairman and a treasurer, the duties of the treasurer are fully outlined, and a schedule for the filing of detailed and exact accounts of contributions is laid down. Unless state law limits the amount to less, candidates for United States Senator may expend $10,000 each; Representatives, Delegates and Resident Commissioners, $2500 each. An alternate schedule is provided. A candidate may expend a sum equal to the amount produced by capitalizing at three cents each all the votes cast at the last general election for all the candidates for the office which the candidate in question seeks, but not exceeding $25,000 for United States Senator, or $5000 for Representative, Delegate or Resident Commissioner. This permits of a sliding scale and makes it possible for a candidate for Senator in a large state like New York to spend more than a candidate for the same office in a small state. A minimum and a maximum are fixed, the one for small states and the other for large states. But a list of liberal exemptions, including assessments, fees, and charges demanded by state law, personal, traveling and subsistence expenses, stationery, postage, writing and printing, distributing letters, circulars, and posters, together with telegraphing and telephoning, make these amounts fixed by statute relatively unimportant. Evidently the last word on party finance has not been said. Should the state contribute to the expense of elections, and forbid constributions on the part of individuals and corporations? Should party dues be fixed at so much a month, thus producing a steady flow of revenue for party purposes? State contributions might encourage irresponsible candidates to run, knowing that it would cost them nothing. However, it might be provided that in case a candidate polled a vote below a fixed minimum he should receive nothing from the state treasury. But the voluntary origin of American parties, together with the native American individualism, and the fact that large party chests can be got together

when the emergency arises, make it improbable that there will be any immediate change in the methods of financing political campaigns. The state confines itself to the prevention of abuses. A system of regular party dues would be more in keeping with American traditions, and, if the expense of administering the plan did not exceed the revenue, would keep party chests well filled.

V. Functions of Parties

From the preceding description of party organization and the nominating process, it is not difficult to infer what is the nature of political parties and what are their functions. What service do they render the voter? the state? That political parties are indispensable to free government was the position taken by Calvin Coolidge in his speech of acceptance delivered before the committee sent to notify him of his nomination in 1924. He said, "A true citizen of a real Republic cannot exist as a segregated, unattached fragment of selfishness but must live as a constituent part of the whole society, in which he can secure his own welfare only as he secures the welfare of his fellow men." That is to say, political parties reflect the organic character of the state. They impart unity to what would otherwise be a disunited mass of voters. They enable voters to act together in the processes of formulating party policies, in presenting candidates for nomination, in carrying on election campaigns, and in conducting the government when they acquire political power. It may have been the extreme individualism of certain of the Fathers which prompted them to fear party alignments. Our theory of the state is more organic than theirs was, and we feel that the individual and the state do not exhaust the entire political universe, but that in addition there are to be found corporations, associations, and societies of many kinds, including political parties. They afford a nucleus for common thought and interest. Like-minded men and women tend to associate themselves for the purpose of crystallizing into action their stock of ideas. Parties are both natural and inevitable as is proved by their rise in spite of solemn warnings to the contrary. The Prohibitionists in 1900 accepted Edmund Burke's definition of a political party. It is as follows: "A party is a body of men joined together for the purpose of promoting, by their joint endeavor, the national interest upon some particular principle upon which they are all agreed." It is to be hoped that party interest always coincides with "national interest," as Burke affirms, but in American party history some exceptions to that rule

might be found. The elements of a party, then, are a body of like-minded men, a goal of national interest, a platform upon which all may stand, and joint endeavor for the promotion of party ends. A stock of common ideas, association, an objective and action—these are the ingredients from which parties are compounded.

If the whole mass of the people were politically enlightened and saw eye to eye on public questions, there would be less need for parties than there is today. But the citizens of a democracy must have political education. They need to be informed on fundamental principles and on current issues. That is why so much space is devoted to the work of political education in platform-making. Fundamental principles concerning the nature of the Union and free government in general are touched upon frequently in platforms. It is true, the average citizen pays little attention to party platforms, but statements found therein are taken as texts by campaign speakers and thus the substance of the platform is brought home to the people. The campaign of 1896 did something to enlighten the people concerning the science of money. Volumes of propaganda were released, much of it chaff for the wind, but when all was over the people knew more about gold and silver standards than before. The issue of imperialism which arose consequent upon the Spanish-American war, with its resulting annexations, taught the people something about the United States Constitution and the nature of the Union. The World War raised many questions of American foreign policy, all of which have not yet been solved. An election is a referendum on certain principles sponsored by political parties. The people must decide; and to do so rightly they must be informed; and the task of informing them has been committed by custom to political parties.

Not only must the electorate be enlightened, but it must have some vehicle of common action. It is difficult to conceive now how the thirteen electoral colleges which began to function shortly after the Constitution went into effect, each meeting in its own state, with very imperfect means of communication, could agree on suitable candidates and come to some decision without a preliminary canvassing and sifting of the available material. One explanation is that the Fathers expected presidential elections to be thrown into the House of Representatives very frequently; and perhaps they would have been had the electoral process not been amended, and had parties not arisen to provide a full survey of the field and the focusing of attention on certain candidates by way of nomination. Parties have afforded a common vehicle for the presentation of candidates, for the organiza-

tion and the carrying on of campaigns, and conducting the affairs of government in the event of success at the polls. Even the direct primary has not broken down party lines, except in the case of the "open" primary. Candidates are still put forward under party labels. Party chests are drawn on to finance primary campaigns. In some cases a party endorsement is considered a sufficiently strong platform for a candidate in the primaries. Party conventions still nominate candidates for the Presidency and Vice-Presidency. State party conventions clarify issues and clear the ground for common action. And when the campaign is on, party organizations work with feverish haste to create favorable public opinion and get out the vote. It is inconceivable how people could work together to attain their political ends without some such alignments as parties. As President Lowell says, they would be like soldiers fighting individually, without regard for a general plan formed to serve as a basis of coöperation and mass attack. Of course, it should not be forgotten that one function of parties is to avoid dangerous issues. Some party leaders are doing the best they can to keep down the prohibition issue. One state leader is advising against a state convention this year (1926) on the ground that a fight over modification of the Volstead Act might split the party wide open.

While the ultimate end of party activity may be "national interest," as Burke confidently believed to be true of English parties, the proximate end is to get out the vote and capture public power. For that purpose issues must be found which have an appeal to the electorate. The opposition must criticize the administration and *vice versa*. Thus there takes place a cleavage in policy, resulting in two rival camps, representing the "ins" and the "outs" respectively, friendly critics or political enemies, depending upon circumstances. These issues take a wide range as can be seen from any collection of party platforms. Almost every human motive is appealed to—sectional advantage, race and religious prejudice, economic interest, and national glory. And the art of skilful management consists in taking advantage of every mistake made by the opposite party, and wherever possible, exalting mistakes into party issues. The League of Nations was a football of politics for a number of years, and even yet serves to frighten the electorate occasionally. The Republican Party played up the issue of American foreign policy, the alleged departure from the fundamentals of the Fathers, depicting the League as a terrifying Frankenstein which in its fury might destroy its makers. Only recently a Republican won the nomination for United States Senator

in a direct primary largely on fundamentalism in American policy. He opposed the World Court and the League of Nations. Other issues entered into the campaign, such as prohibition, farmer discontent and labor, but the candidate himself believes that his victory was due to his American political fundamentalism. He stumbled on an issue almost by accident. It is not always possible for party leaders to create issues out of thin air. The people sometimes force parties to take up issues. The money issue was forced on the Republican party in 1896. Both woman suffrage and prohibition have been forced on the major parties. If the public mind is unstirred, party leaders can make issues almost at will. On the placid waters of public opinion they can sail their little boats to their hearts' content; but when the surface is lashed into fury by the wind, and the waves roll mountain-high, little boats must run for cover or be swamped. Only large and strong boats, driven by unfailing power, can ride out the storm. Sometimes the will of the people bends before it the will of party managers, and chooses for itself the dominant issues of a campaign.

In the government of the United States political parties have a peculiar rôle to play. They do not govern directly as they do in England and on the continent. The Constitution makes no provision for them. They are not wheels in the governmental machinery. Rather they might be likened to friction drums which drive the wheels of government from without. But they do much to force the wheels to turn in unison, without grinding or stripping of gears. The Fathers had unlimited faith in the separating and balancing of powers, and to that end they created a system capable of frequent and prolonged deadlocks. They felt that it would have to move somehow, and move it would. Well, it has moved, but not precisely in the way they had envisaged. The interlocking contact between the executive and the legislature, forcing them to coöperate, has been party machinery. When one party captures the executive and the legislature, there is little chance of deadlocks; measures go through as on well-oiled wheels. The veto power is held in abeyance. The entire administration of government is shot through with a unifying and harmonizing principle for which we are indebted to party politics. The dominant party speaks for the nation, legislates for the nation, executes the laws for the nation, and represents the United States in foreign affairs as one sovereign and independent power. A federal system based upon a separation of powers would be sadly lacking in cohesion and drive without the unifying force of political parties. It might be a government of laws, but it would be lifeless. Parties have revived the

idea of a government of men, and have superimposed it upon the ideal of the Fathers, a government of laws. So that now we have constitutional machinery driven by party politics, sometimes in the narrow interest of those who control, often in the wider interests of the nation.

Jean Jacques Rousseau feared intermediate bodies in a state. He thought that they hindered the ready and easy formation of the general will. They are like bits of iron near a compass; they deflect the needle from the pole. So he advocated destroying all subordinate bodies and leaving the individual face to face with the sovereign state, by which he meant the people collectively. It was this philosophy which underlay the French Revolution when it marked privileged bodies and corporations of all kinds for destruction. It destroyed a titled nobility, an established church, and corporations of artisans. Its leaders intended to pulverize society in the interest of individual liberty and private property. But once the Revolution was over, their work was undone. Trade unions sprang up in spite of legislation against them. Subordinate, dependent, and intermediate bodies form spontaneously, and in fact they are a bulwark of liberty, rather than a hindrance thereto. In this class political parties may be placed. They are not corporations, but they represent groups of citizens who will stand as a wall of defense against despotism. The publicity which results from the criticism of the party in power by the opposition is an effective check on usurpation and tyranny. Parties represent government by discussion, and such government is always free. Bentham thought that the motto of a good citizen under a government of good laws should be, "To obey punctually, to censure freely." It is only when one party dominates a country to the exclusion of open opposition, shutting off discussion and shackling the press, that free government is in danger. Military régimes, dictatorships, and corrupt combinations of private interests masquerading as political parties, throttle liberty. Real political parties, founded upon national interest, even though this is interpreted in terms of party interest, serve to lessen the impact of authority upon individual liberty. Parties in America have championed the rights of man, in the abolition movement, the right to vote regardless of sex, the rights of the working man and of women and children. They have an honorable record as defenders of freedom. Without the sense of responsibility to the public which actuates the party in power, many unwise and even pernicious measures might be passed. Political parties are a bulwark of liberty.

VI. The Unwritten Constitution

The rise of political parties in the United States has affected the form and the processes of government in a number of ways. The power of the President has been greatly increased through his position as leader of his party. By the Constitution the President has the power of appointment. That enables him to control the federal patronage and to place in his political debt Senators and Representatives whose recommendations as to appointments have been accepted. There is nothing corrupt *per se* about patronage. The President is not in position to know every aspirant for United States District Attorney, Collector of the Customs, Commissioner of Immigration or United States Marshal throughout the entire length and breadth of the land. He must seek the advice of those who are acquainted with men and local politics. Naturally he turns to certain Senators or Congressmen for information and suggestion. Then when the administration is in need of help to put through Congress one of its measures, the President turns to the same source, to men who have been consulted before and who are known to be in sympathy with the administration's policies. There is no collusion or corruption about it. It is "senatorial courtesy." Proof that no sinister bargain is struck is to be found in the fact that members of Congress who usually stand with the administration may on occasion notify the President that in regard to a particular measure they will be unable to vote with him on account of public opinion among their constituents. The President will respect such a declaration, even though the members in question have enjoyed a fair share of the federal patronage. A few regular Republican Senators, who can be counted on to support administration bills, informed the President prior to the vote on the World Court that they would be obliged to vote against the United States' adhering to the protocol, in view of the state of mind of their constituents.

Political parties at one time transformed the office of Speaker of the House of Representatives from a colorless parliamentary position into something akin to a premiership. Professor Albert Bushnell Hart once wrote: "The Speaker of a House of legislature is therefore like the Prime Minister of England, the center of systematic legislation, working through and in harmony with the members of the majority."[7] That was in the year 1903 when the power of the Speaker was almost unlimited. He was a political czar, with power to reward

[7] A. B. Hart, *Actual Government* (1903), p. 134.

or punish members of the House by appointing them to prominent committee positions or excluding them altogether. The Speaker appointed all committees and through them determined the fate of legislation. He still has the prerogative of recognition which enables him to find out what a member is going to say before he is given the floor; and he still has a certain parliamentary power to control the business of the House; but the order of business gives certain committees the right of way, and time is set apart for the consideration of certain types of legislation. The Speaker is no longer a czar. The revolt which had begun earlier, came to a head in 1911, when a resolution was passed providing that the Committee on Rules should be elected by the House. In the next Congress, with the Democrats in control, the rules were amended so as to make all committees elective. This change has served to throw power into the hands of party caucuses, which really select the committees, and into the hands of floor leaders. Thus the power of the Speaker has been divided and rendered innocuous. But the point is, that through the growth of party politics there began to emerge an office not unlike that of Prime Minister in foreign governments. The Speaker was both the nominal and actual leader of his party in the lower house, a position comparable in some respects with the premiership of England.

The principle of responsibility has been developed to a certain extent in American politics. Under our system of separation of powers leadership is lodged nowhere. Strong Presidents lead by sheer force of personality and the aid of party support. Speakers such as Henry Clay, James G. Blaine, and Thomas B. Reed have made a place for themselves, even though the Constitution does not mark out their office as one of leadership. Certain Senators have at times enjoyed a position of prominence far above the average level because of their stand on political questions of the day. Political bosses have sometimes manipulated the wires from behind the scenes. Woodrow Wilson made a conscious effort, it would seem, to transform the American form of government from a disjointed system of separated and balanced powers into a smoothly running system of coördinated powers, without a constitutional amendment. President Wilson wished to be his own prime minister. He went to Paris and sat in the Peace Conference among prime ministers. There were no crowned heads or other presidents there. President Poincaré of the French Republic opened the sessions with an address of welcome, and then retired not to appear again. The French Government was represented by its President of the Council, popularly known as Prime Minister, Georges Clemen-

çeau. But Woodrow Wilson was both the President of the United States of America and head of the American delegation. In short, he was the American Prime Minister. In his "Congressional Government" Wilson looks with favor upon the cabinet-parliamentary type, because of its concentration of party responsibility in the hands of one man or a definite group of men. It localizes power and responsibility. He was a firm believer in party government, as understood in England and on the Continent. In his theory, the President would occupy the place of the Premier, shaping the policies of the government, and by the aid of his congressional majority, enacting them into law. Thus there would be an end to friction between the executive and the legislature. There would be few vetoes and no deadlocks. The party in power would assume responsibility before the country for the acts of government, and would be held responsive to the will of the people through general elections. But the sequel proved that the American form is not so easily molded into anything different. Wilson lost his majority in Congress, and the work of his hands was undone. The Treaty of Paris which he helped to draft, and to which he attached his signature at Versailles, was ratified by the Senate with reservations which were unacceptable to him. A deadlock ensued which was a cause of wonder and amazement among European statesmen. Speaking to his classes at the University of Bordeaux, at the time of that deadlock, Léon Duguit, Dean of the Faculty of Law, referred to the "very serious consequences of the American doctrine of the separation of powers." And they were serious. The lines which separate powers in the American system of government seem to have cut so deeply into the fabric of the nation, that no assumption of ministerial responsibility on the part of the President can eradicate them. Ours is not a parliamentary form of government.

Finally, the American party system has opened the way for various types of leadership entirely outside of the government. Self-appointed leaders appear and endeavor to gain a following. In the normal parliamentary type of government, leadership is lodged in the prime minister and his cabinet. They speak and act for the government so long as they are in power, and when they lose the confidence of the lower house they resign to make room for the leaders of the new majority. In the presidential type of government, leadership is not definitely lodged anywhere. The American party system has developed distinct types of political direction, some of them worthy and others not so worthy, but all extra-constitutional and deriving their power from the "unwritten constitution." This human factor in American poli-

tics has been treated most understandingly by Professor William Bennett Munro in his book, *Personality in Politics.* Out of a wealth of experience with political methods and with public men, Professor Munro has written in a fascinating manner of the reformer in politics, the boss in politics, and the leader in politics. Neither the reformer nor the boss seeks to use party machinery for the purpose of responsible government. The typical reformer is so intent upon remodeling the present social order that he has little interest in actual political processes, except as they fit into his peculiar scheme of things and may be made to serve his special purposes. The boss, on the other hand, uses party machinery effectively; but the end in view is the promotion of his own selfish interests. He is highly efficient in his own way for his own ends. It is the leader who makes use of political methods for the high purpose of educating public opinion, bringing forward and discussing public issues, organizing the electorate, raising funds, and pressing for legislative action on important measures. It is he who makes workable a "government of men." Professor Munro links indissolubly democracy and leadership. Of democracy he says, "It is a manufactured product, more or less refined in the process of manufacture. It rests on the consent, but upon a created consent which the leaders build up and maintain. It does not rest on the opinions, but on the activities of men." [8] It might be a fair question to raise, if all three—the reformer, the boss and the leader—are not, or have not at times been, necessary to the processes of government in the United States. Certainly the boss has taught American citizens the value of organization and efficiency. His ideals will not bear scrutiny, but his methods might be studied with profit. The reformer is an idealist, and the leader is a realist in politics, and there seems no good reason why a division of labor might not be arranged between them. In 1872 the Prohibitionists laid before the country in their platform a set of principles which must have appeared to the realists of that day Simon-pure sentimental idealism, e.g., suppression of the liquor traffic, election of United States Senators by direct vote of the people, and woman suffrage. In 1872 these proposals were little more than an idle dream of reformers. Years passed; public opinion changed; and leaders began to see political potentialities in these measures. They were taken up by the major parties, and at length found their way into the Constitution by amendment. The reformer's ideal, through the evolution of public opinion, plus intelligent organization, may acquire vote-getting possibilities. At the beginning of the

[8] *Personality in Politics* (1924), p. 93.

series stands the reformer, calm and confident in the ultimate triumph of the right; at the end stands the leader, busy about the work of molding public sentiment and organizing his forces so as to enact into law proposals once put forward by dreamers. During the forty-odd years between 1872 and 1919 party politics afforded abundant opportunity for the discussion of public questions, and the Prohibitionists were not backward about taking advantage of it. They educated public opinion, carried on propaganda, and built up their party organization. With the passing of time and changed social and industrial conditions, the old "reformer" gave place to the new "leader." Organization took precedence of ideals, and when the prohibition drive was started in earnest, it went through with a momentum that carried the principle of the suppression of the liquor traffic into the Constitution. The Prohibition Party, it is true, did not supply the principal driving power; that was found in organizations outside the Party. For nearly a half century the Prohibitionists had been supplying the country with a full set of political ideals; it remained for non-partisan, but yet political, organizations to realize objectively in fundamental law what the reformers had been preaching since 1872. Leaders capitalized the work of reformers, and made into law what had at first been proclaimed as a beautiful but impracticable ideal.

Not all political activity is confined to political parties. The principle of association runs throughout society and crops out in many forms, such as clubs, leagues, committees, and parties.[9] The direct primary and direct government through initiative, referendum, and recall open the way for organized non-partisan and even non-political groups to participate in the settlement of public questions. The Anti-Saloon League takes to itself not a little of the credit for the successful drive in favor of prohibition. It is a political but non-partisan organization. It is content to work through any and all parties, just so the country is kept dry. The National League of Women Voters is a political organization, but it is not partisan. Women's clubs, with their inclusive federations, must be reckoned with by political leaders. The American Federation of Labor is in politics, but it follows no party. It is thoroughly opportunist in its attitude toward platforms and candidates. Wherever a vote for labor will do the most good, there the Federation will exert its influence to have the vote delivered. Agricultural societies may be relied upon to supply votes when the interests of farmers are at stake. Churches, chambers of commerce, and other business organizations, as well as social groups, occasionally

[9] See Merriam, *op. cit.*, Chap. XIII.

take a stand on political issues and promise votes for or against a measure. Veterans' clubs have had their influence on political decisions. The Non-Partisan League really belied its name. It was a third party in embryo, and if it had spread more widely and attained permanence it would have been ranked as a new party. It had its political machinery, its platform, and its candidates; it carried on campaigns and raised funds to defray expenses. But its influence was confined to one section, and therefore it was a faction or bloc, rather than a national party. New organizations spring up overnight like mushrooms when a campaign is approaching. In local elections, Tax Reduction Leagues, Tax-Payers' Leagues, committees of "One Thousand" and of "Ten Thousand" are formed for propaganda purposes, to scrutinize candidates and have a part in nominations and elections. Not infrequently "dummy" organizations are set up and decked out like real citizens' associations. They present a smiling mask to the electorate, while the actuating motive may be selfish and even sinister. They may speak in the name of the public good, but their vote may be cast in the name of corporate greed. The voice is the voice of Jacob; but the hands are the hands of Esau. It is one of the duties of good citizenship to be able to detect bogus and fictitious organizations, formed for private and selfish ends, and to differentiate between them and *bona fide* groups acting in the interest of the community, state, or nation. The citizens of a democracy must not allow themselves to be fooled by appearances, for too much is at stake.

READING NOTES

As the customs and usages of political parties become fixed and are crystallized in statutes, a valuable source of information as regards the party machinery of a given state, insofar as it is visible, will be found in general election laws. Reference has already been made to the *General Election Laws of California,* and to similar laws of the State of Washington. A majority of the states of the Union publish their election laws, often including their primary laws, separately in pamphlet form. The entire nominating and electoral machinery, including platform-making, committee organization and voting, is being regulated by public law. That means that the party is rapidly becoming a cog in the wheel of government. The former days of spontaneous and voluntary party activity, not a little of it nameless and invisible, are gone forever.

There is an abundance of material on party organization and party processes. Among general treatises, the *magnum opus* is *Democracy and the Organization of Political Parties* (2 vols., 1902, trans. from the French), by M. Ostrogorski. See also *Democracy and the Party System in the United*

States (1910), by the same author. A lucid account of party organization, with special exhibits from several states, is found in *Party Organization and Machinery* (1904), by Jesse Macy. See also *Political Parties and Party Problems in the United States* (1903), by James A. Woodburn, *Early Political Machinery in the United States* (1903), by George D. Luetscher, and *The Courts, The Constitution and Parties* (1912), by Andrew McLaughlin. General treatises include A. Lawrence Lowell, *Public Opinion in War and Peace* (1923), William M. Sloane, *Party Government in the United States* (1914), Robert C. Brooks, *Political Parties and Electoral Problems* (1923), P. Orman Ray, *Political Parties and Practical Politics* (1922), and Charles E. Merriam, *The American Party System* (1923). The relation between public opinion and political parties is admirably set forth by Edward M. Sait in *American Parties and Elections* (1927).

Special studies include, Arthur C. Millspaugh, *Party Organization and Machinery in Michigan since 1890* (1917), Lyon G. Tyler, *Parties and Patronage* (1891), S. Gale Lowrie, *Corrupt Practices at Elections* (1911), Daniel S. Remsen, *Primary Elections* (1895), Charles E. Merriam, *Primary Elections* (1908), Louise Overacker, *The Presidential Primary* (1926), Samuel P. Orth, *The Boss and the Machine* (1919), Charles E. Merriam, *Four Party Leaders* (1926), Charles E. Merriam and Harold F. Gosnell, *Non-Voting* (1924), and a recent experiment in the stimulation of voting, *Getting Out The Vote* (1927), by Harold F. Gosnell. For a solid body of facts relating to the financial outlay of primaries and elections, consult *Cost of Primaries and Elections in Maine* (1926), by Orren Chalmer Hornell of Bowdoin College, in Bowdoin College *Bulletin,* Number 157, July 1926. An excellent study in party finance is the work of James K. Pollock, Jr., *Party Campaign Funds* (1926).

A useful collection for supplementary study is, *Readings on Parties and Elections in the United States* (1912), compiled by Chester L. Jones.

For a refreshing treatment of the problem of the relation of money to politics, marked by unusual clarity and sanity, see *The Money Power in Politics,* by William Bennett Munro, in *The Atlantic Monthly* for April, 1927.

PART III

FOREIGN RELATIONS OF THE UNITED STATES

CHAPTER XIII

PRINCIPLES AND POLICIES OF AMERICAN FOREIGN RELATIONS

I. Non-Intervention and the Monroe Doctrine

The Political Systems of Europe and America.—It is idle to attempt to find in ancient or European systems a parallel for American foreign policy. It is a matter neither of identity nor of analogy, for European and American policies differ both in theory and in practice. However, since the American system is to some extent an outgrowth of the European, and since international relations have become so acute and so complex, the political system of the one has a direct bearing upon the political system of the other. The theory of state interests and of the right of self-preservation dominated the ancient Greek and Roman political world. Aristotle declared that the state was a self-sufficient body, and that the desires of the individual should be subordinated to the interests of the state. Thus in both the Greek and Roman world the concept of the primacy of the state was well established. The state therefore found its interest in international relations and sought to cause its will to prevail over exterior as well as interior forces. This theory of the state, in its external aspect, was expressed in alliances at the time designed to preserve peace among the Mediterranean peoples or to check the inordinate power of ambitious states. The Greek and Roman states-system, antedating the modern European system, was based upon the idea of state interests which extended to a group of states through alliances designed to preserve the balance of power between them. This explains, in a sense, both the principle and the practice of intervention.

The European states-system is definitely based upon the system of alliances and the balance of power. These considerations were enhanced by the rise of the nations. The break-up of the Roman Empire, and of the Empire of Charlemagne, settled the fact that European political development should be national in character. Niccolo Machiavelli, who wrote in the fifteenth century, advocated the doctrines of state interests and of political expediency. He gave concrete expression to the doctrine of the balance of power. In Italy, Naples, the Papal States, Tuscany, Venice, and Milan attempted to maintain

the balance of power among them. Prior to the Thirty Years' War there was great rivalry between the Bourbon and the Hapsburg dynasties. Government in France was strongly absolutist in character. Spain was dominant in trade, commerce, and sea-power. Some sort of equilibrium was required among the states of Europe. In the sanguinary conflict of the Thirty Years' War the principles of intervention, alliances, and balance of power played a leading part. The Peace of Westphalia established definitely the European political system and laid the foundations of European public law; it did not, however, remove from Europe the danger of ambitious states. The ambitions of Louis XIV disturbed the peace of Europe, but by a series of wars he was prevented from achieving his military and territorial aims. The War of the Spanish Succession was settled in 1713 by the Peace of Utrecht, whereby France was reduced to her original position as an ordinary European power, and the ambitions of Louis XIV were definitely curbed. English dominance in North America and the humiliation of France and Spain resulted from the Seven Years' War, terminated by the Treaty of Paris in 1763. The principle of partition was applied to Poland by the partitions of 1772, 1793, and 1795. When the French Revolution broke out, in 1789, it was at first purely a national movement. As the revolutionary spirit increased there developed a desire to carry the principles of liberty, fraternity, and equality to all men everywhere. This frame of mind inevitably alarmed and aroused the nations of Europe, which combined to defeat the plans of the revolutionary leaders and to thwart the pretensions of Napoleon Bonaparte. Numerous alliances were formed, each having for its purpose the maintenance of the principle of the balance of power, and the taming of those who sought to disturb the peace of Europe. The disastrous conflict which broke out in 1914 was between two groups of great powers: the Triple Entente, at first composed of England, Russia, and France; and the Triple Alliance, composed of Germany, Austria, and Italy. After the war began there were certain shifts in these alliances, and while it was in progress most of the states of the world became involved in it. There is no doubt that the European concert of nations has more often than not kept the peace of Europe. The great conflagrations involving the nations of the world have broken out at intervals of about one hundred years. While the peace of a hundred years is worth keeping, a conflict of world proportions and of terrible consequences is a heavy price to pay for it. The ideal of the League of Nations is to do away with the system of alliances, the principles of intervention and balance of power, and in

their place to establish a world organization where groups of combinations of powers are unnecessary and where the world in effect makes war against the offending or the aggressor state.

Opposed to the theory of intervention is the principle or the theory of non-intervention. This principle gained approval only among the smaller states; it could not flourish in Europe. So long as the system of alliances continued, the principles of balance of power and of intervention had to prevail. No sovereign state would agree to abstain from interfering in the internal affairs of another state when such abstinence might mean its own destruction. It was reserved to the United States to adopt non-intervention as a deliberate and consistent policy, the application of which has been fairly logical, with certain important exceptions. These exceptions, due to their significance, have become practically a part of the rule.

The French Alliance.—The United States in seeking to establish its independence had to do several things. In the first place, it justified its independence in the form of a document called the Declaration of Independence; in the second place, it established a form of government through articles of union drawn up by the Continental Congress; in the third place, it sought to get in touch with foreign powers through the establishment of a committee of secret correspondence. A plan for treaties was drafted, and ministers were sent abroad to seek recognition and subsidy. As an aid to independence, the recognition of France was especially sought; and through the patience and persistence of the great Benjamin Franklin this was finally secured. France did not enter into the treaty of alliance until circumstances indicated probable American success and until her interests dictated such a step; but there is no doubt that French recognition of American independence and the entry of France into the war as an ally of the United States hastened the end of the Revolution. The American commissioners entered into a definite alliance with France against Great Britain. In the event of war between Great Britain and France before the close of the Revolution, the United States and France agreed to "make it a common cause and to aid each other mutually with their good offices, and counsels and forces; according to the exigence of conjectures, as becomes good and faithful allies." The avowed purposes of the defensive alliance was to maintain the absolute and unlimited liberty, sovereignty, and independence of the United States, both in matters of government and in matters of commerce. This alliance almost had the effect of drawing the United States into the French Revolutionary and Napoleonic

Wars. The American Constitution went into effect in 1789, and in that year the French Revolution broke out. American sympathy with the Revolution was profound. The intervention of the great powers in their conflicting efforts to prevent the spread of liberal principles, and hence to save the day for the reigning dynasties, brought about a general European war. It became necessary for the United States to define its relation to this conflict. Opinion in this country was divided, some even going so far as to urge American intervention on the side of France. Another group favored England. There was not so much agitation for entering the war on the English side, but a determined effort was made to keep the United States neutral, and thereby prevent American intervention.

The appointment of Genêt as minister of the new French Republic to the United States brought the situation to a head. The question was raised as to whether or not the treaties of 1778 with France were annulled or suspended; whether or not a minister from the French Republic should be received, and if so, whether fully or with qualifications; and whether or not a neutrality proclamation should be issued. After some discussion among the members of the Washington cabinet it was agreed that the minister should be received, that the neutrality proclamation should be issued, and that the treaty should be regarded as still in effect. The United States resisted forcefully and successfully the unneutral conduct of the French minister and attempted to maintain a fair neutrality. The Jay Treaty of 1794 with Great Britain settled the points of conflict between the two countries, and also settled the fact that the United States would maintain its neutral position throughout the war unless violations of its neutral rights should make this impossible. The treaty of alliance between France and the United States was abrogated by act of Congress in 1798. Thus we narrowly escaped participation in the general European conflict during the French Revolutionary and the Napoleonic eras. In the first years of our history as a republic we were definitely committed to the policy of a foreign alliance, dictated of course by our interests; but from the time of the adoption of the American Constitution until the Congress of Vienna we were concerned with the safest method of terminating the French alliance, and of keeping ourselves aloof from the European controversy. The establishment of the principle of non-intervention was the result, not only of a troublesome experience with the European political system, but also of a deep-seated belief shared by our statesmen that the United States should be a nation apart and should carve out its own

destiny without unnecessary relation to the affairs of Europe. The theory existed as a political principle and as a part of the political philosophy of the leading American statesmen of the revolutionary period. The policy was sorely tried and tested. However, it was strictly adhered to, and in the end it was one of conscious purpose designed to be maintained in all emergencies. This purpose was not a matter of casual development. It was already fixed in the minds of the statesmen; its application had to depend, as is always the case, upon the nature and course of events.

The Influence of Geography.—The theory of non-intervention was enhanced by the geographical position of the United States. The fact that the British colonies were separated by three thousand miles of water from England, more than anything else, aided in the cause of independence. The same fact has contributed most profoundly to our strictly American interests and to the continued application of the principle. The colonists, by reason of physical separation, could not secure the same rights as were enjoyed by British citizens. Upon these rights they rested the revolutionary case. Such separation also gave England every commercial advantage. Physical separation and political union would not work; both political and physical separation was the solution.

The American Theory of Government.—The second reason for the adoption of the principle of non-intervention was found in the American form of government, and in the conception of the right of revolution. Wars to preserve the balance of power had largely originated in designs to save or to fortify the position of reigning dynasties. The establishment of a republican government with no royal house would eliminate dynastic wars such as had been the curse of Europe. Current political theories and their diverse applications were well represented in the writings of Hobbes, Locke, and Rousseau. All three of these writers espoused the conception of the social contract, but their applications of it differed widely. Hobbes inferred from it that men had consented to the establishment of an all-powerful sovereign. The state existed to maintain order and the rights of property; but such maintenance was in the discretion of the sovereign, who made the laws but was not himself bound by them. Any state was better than no state, since the condition of war which existed prior to the establishment of society was more terrible than the tyranny of the worst prince. The sovereign power, once relinquished and conferred, could not be alienated. This theory was applicable to the English system more than to any other. Locke drew other conclusions. There

were certain inalienable rights which could not be surrendered by the individual. The state was established to maintain life, liberty, and property through the institution of a recognized system of law and a common judge. The purpose of the state was secured through the establishment of a government, the duty of which was to protect life, liberty, and property. Whenever the government failed to accomplish these purposes, it might be overthrown and a new one might be set up in its place. This was very acceptable philosophy to the Americans. Rousseau held that the individuals conferred all their rights and powers on an organized society which was the sovereign power, and which gave expression to its sovereignty through the general will. Government, being only an administrative agent, might be changed at will by the sovereign power.

Instead of adopting one of the extremes, American statesmen took the middle ground as advocated by Locke. To admit that only the sovereign could maintain rights, that the sovereign was not bound by law, and that sovereignty, once conferred, could not be alienated, would be to favor royalty and the consequences of dynastic quarrels. On the other hand, to conclude that the government might be changed at will without qualification was not satisfactory. Americans were content to reason that certain rights could not be conferred; and that if the government formed to secure these rights could not guarantee them, it might be overthrown. The right of revolution, then, was justified only in the case of a government which failed to secure the natural rights of man. The Declaration of Independence was practically a statement of these principles. It declared that when any form of government became destructive of its original ends, it was the right of the people to alter or abolish it. But while the right was recognized, stress was laid upon the seriousness of the step. "Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed." The document then goes on to enumerate the failures of the British government to secure these rights, thereby justifying political separation from England. It is well to point out the wisdom of the American course. To have adopted the view of Hobbes would have led either to colonial submission or to the establishment of an independent monarchy with all its attendant dangers; while to have followed the principles of Rousseau would have meant the carrying of the right of revolution to the straining-

point. The effect of Rousseau's teachings was seen in France, when the effort was made to carry liberty to all oppressed peoples. The adoption of either extreme might have resulted for the United States in a virtual abandonment of the policy of non-intervention.

The Position of Congress.—The view of Congress was strictly in favor of the non-intervention principle. After the adoption of the Constitution the management of foreign affairs was practically transferred from Congress to the President. Congress would favor no policy suggesting direct interference in European affairs. Such an attitude had been manifested by the Congress under the Articles of Confederation in the matter of armed neutrality. On May 21, 1783, in connection with the Dana mission of Russia and the desirability of a commercial treaty with that country, it was on motion of Alexander Hamilton, seconded by James Madison, resolved:

> That though Congress approve the principles of the armed neutrality, founded on the liberal basis of the maintenance of the rights of neutral nations and the privileges of commerce, yet they are unwilling, at this juncture, to become a party to a confederacy which may hereafter too far complicate the interests of the United States with the politics of Europe, and therefore if such a progress is not yet made in this business as may make it dishonorable to recede, it is their desire that no further measures may be taken at present towards the admission of the United States into that Confederacy.

Congress had approved on October 5, 1780, the principles of the armed neutrality; and the Board of Admiralty was instructed to prepare rules for the commanders of American ships conformable to those contained in the Russian declaration, while American ministers were authorized, if invited to do so, to accede to the principles. But on June 12, 1783, Congress declared that the primary object of the resolution of October 5, 1780, and of the commission and instruction to Mr. Dana in regard to the accession of the United States to the neutral confederacy could no longer operate, and that, since the true interests of the States required that they be as little as possible entangled in the politics and controversies of European nations, it was inexpedient to renew such powers to the American ministers abroad. And it was accordingly resolved:

> That the ministers plenipotentiary of these United States for negotiating a peace be, and they are hereby, instructed, in case they should comprise in the definite treaty any stipulations amounting to a recognition of the rights

of neutral nations, to avoid accompanying them by any engagements which shall oblige the contracting parties to support those stipulations by arms.

The Views of Statesmen: Adams and Washington.—The most independent of American diplomatists was John Adams. From the first he was the spokesman and defender of the principle of non-intervention. On November 10, 1782, he disclosed to Mr. Oswald's secretary, in no uncertain terms, his views on this question. He observed that there was something in the minds of the English and French which frequently impelled them to war, but that if anything were done as regards peace which the Americans thought hard or unjust, "both the English and French would be continually blowing it up, and inflaming the American minds with it, in order to make them join one side or the other in a future war." Mr. Oswald, he opined, had good reason to think that America would be glad to join France in such a war, and he took pains to undeceive him on this point. He summarized his view in the following words: "For my own part, I thought America had been long enough involved in the wars of Europe. She had been a football between contending nations from the beginning, and it was easy to foresee that both France and England would endeavor to involve us in their future wars. I thought it our interest and duty to avoid them as much as possible and to be completely independent, and to have nothing to do but in commerce with either of them; that my thoughts had been from the beginning to arrange all our European connections to this end, and that they would be continued to be so employed."

A few days later he expressed to Mr. Oswald his fear that the United States would be made the tool of the European powers and that their manœuverings would bring the United States into their real or imaginary balances of power. It should be the rule of the United States not to interfere, and of the powers of Europe not to desire or even permit such interference. Subsequently President Adams, in referring to certain French indignities, stated that France and the world should be decisively convinced that the United States would not be made "the miserable instruments of foreign influence." He recognized that the American form of government exposed the United States openly to the "insidious intrigues and pestilent influence" of foreign nations, which could be averted only by an "inflexible neutrality."

The views of President Washington are best set forth in his Farewell Address of September 17, 1796, in which he warned the American people against favoritism toward or hatred of any particular na-

tion. Favoritism, he said, might easily lead to imaginary common interests where none really existed; and might easily result in concessions to the favored nations which would be regarded as grounds for resentment by the others. He further pointed out how the favoritism of a small nation for a larger would result in the ultimate submission of the former to the rule of the latter, and how foreign influence was one of the most baneful foes of republican government. He stated his position in the following memorable words:

> The great rule of conduct for us in regard to foreign relations is, in extending our commercial relations to have with them as little political connection as possible. So far as we have already formed engagements let them be fulfilled with perfect good faith. Here let us stop. Europe has a set of primary interests which to us have none or a very remote relation. Hence she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns. Hence, therefore, it must be unwise to implicate ourselves by artificial ties in the ordinary vicissitudes of her politics or the ordinary combinations and collisions of her friendships or enmities.
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> Our detached and distant situation invites and enables us to pursue a different course. If we remain one people, under an efficient government, the period is not far off when we may defy material injury from external annoyance; when we may take such an attitude as will cause the neutrality we may at any time resolve upon to be scrupulously respected; when belligerent nations, under the impossibility of making acquisitions upon us, will not lightly hazard the giving us provocation; when we may choose peace or war, as our interest, guided by justice, shall counsel.
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> Why forego the advantages of such a peculiar situation? Why quit our own to stand upon foreign ground? Why, by interweaving our destiny with that of any part of Europe, entangle our peace and prosperity in the toils of European ambition, rivalship, interest, humor, or caprice?

European Background of the Monroe Doctrine.—Non-intervention in the politics of Europe having thus been definitely accepted by American statesmen as a cardinal rule of American foreign policy, based not only on physical conditions, but also, and mainly, on a deep-seated belief in a distinct American destiny, political and social, the developments of the principle merely awaited the occurrence of events. Of great concern to the United States was the question of European colonial possessions in this country. The transfer of colonies from one European nation to another was a matter of some concern. Then, too, there was the effort of European governments to acquire new domains either by settlement or by conquest. Such a result made territory adjacent to this country a battle-ground among the Euro-

pean powers. The American representatives had to work diligently to secure the commercial and territorial rights essential to the growth of a young nation. The first manifestation of this was the effort put forth to gain the right of navigation on the Mississippi River. Territorial, commercial, and defensive questions hinged on the disposition of the Mississippi question. Unexpected relief came through the French cession of Louisiana to the United States on April 30, 1803, whereby a vast area was excluded from the sphere of contest among European powers. Provinces of western and eastern Florida were ceded by Spain to the United States on February 22, 1819. Thus, the free navigation of the Mississippi, the cession of Louisiana, and the cession of the Floridas helped to exclude European territorial and colonial influence. The significance of the Louisiana Purchase in relation to the doctrine of non-intervention and to American solidarity was expressed by the commissioners as follows:

> We cease to have a motive of urgency, at least, for inclining to one Power, to avert the unjust pressure of another. We separate ourselves in a great measure from the European world and its concerns, especially its wars and intrigues. We make, in fine, a great stride to real and substantial independence, the good effect whereof will, we trust, be felt essentially and extensively in all our foreign and domestic relations. Without exciting the apprehension of any Power, we take a more imposing attitude with respect to all. The bond of our Union will be strengthened, and its movements become more harmonious by the increased purity of interest which it will communicate to the several parts which compose it.

While the territorial question was thus being satisfactorily settled, a series of events was taking place in another quarter. These events centered in the revolt of the Spanish colonies in America and their struggle for independence. The Spanish cession of Louisiana to France had aroused this country to the dangers that might follow the passing of the Spanish colonies into other European hands. The United States was now confronted with the further question as to the recognition of the independence of those colonies, and as to the attitude to be taken toward intervention by European powers to suppress that independence. At the close of the American Revolution it would seem that Spanish occupation of American territory was at its height. With the exception of the Brazilian coast, Spain owned all the territory extending from St. Mary's River in Florida, southward around Cape Horn, and thence northward along the Pacific coast to the archipelago of the northwest coast.

Many of these colonies were important to the United States both in

a physical and in a political sense. The decline of Spain during and after the Napoleonic Wars made possible the revolutions in her South American colonies. These revolutions took place after Napoleon had placed his brother Joseph on the Spanish throne, in 1808. Revolutionary propaganda and the success of the American constitutional system all helped to encourage the revolts. The United States could not view without inquietude the passing of any of this territory from Spain to any other foreign power. The problem of recognition on the *de facto* principle was a serious one. It was quite another thing to secure the independence of these new states against European aggression. Their independence was an advantage to the United States, but it was also an added responsibility. The principle that the United States would have no political dealings with Europe had been definitely established, and this policy could not be abandoned until an attempt was made to provide it with additional safeguards. In due course of time the independence of these countries was recognized on the *de facto* principle and it became necessary for the United States to define its relation to them.

No discussion of the Monroe Doctrine is complete without a review of its antecedents. The purpose of the European coalition had been to check the liberal movements which might spread from France, and to crush Napoleon Bonaparte's inordinate ambitions. After this was done, the coalition would naturally seek to put down revolutions, to preserve rights of succession, and to defend the principle of legitimacy. These activities would extend even to America, whose example and influence could not be disregarded.

The celebrated Holy Alliance was concluded September 26, 1815, by the Emperors of Austria and Russia, and the King of Prussia. Its object was to publish to the world their fixed resolution to take for their sole guide in the administration of their governments, and in their administration of all other governments, the essential principles of Christianity—justice, charity, and peace. By Article I, they agreed to remain united by bonds of a true and indissoluble fraternity, and to lend one another assistance on all occasions and in all places. By Article II, it was agreed that the sole principle of conduct was to be the rendering of mutual service. The three nations were recognized as three branches of one family, of which Christ was the sovereign. Their subjects were advised to strengthen themselves in the principles and observance of the Christian religion. By Article III, all powers avowing these principles and recognizing the necessity of their application were invited to join the alliance.

On November 20, 1815, a treaty of alliance was concluded at Paris between Great Britain, Austria, Prussia, and Russia. This provided for the restoration of the monarchy in France and for the control of Europe. The powers considered that the peace of Europe was essentially bound up with the order of things founded on the maintenance of the royal authority and the constitutional system. They engaged to do all they could to prevent further disturbances. An allied army would be maintained in France to that end. By a former treaty Napoleon Bonaparte and members of his family were forever excluded from the rule of France. This alliance exercised a rigid control over the affairs of Europe. The members agreed to redouble their precautions to prevent further usurpations. By Article VI, they agreed to renew their meeting at stated periods for the better execution of their plans and for consideration of any new situations.

The Conference of Aix-la-Chapelle was a result of the resentment of France toward continued allied occupation of French territory. On November 15, 1818, the courts of Great Britain, Austria, France, Prussia, and Russia made a declaration relative to arrangements concluded between France and the allied nations. They regarded their efforts as the work of peace, directed toward the completion of a political system which would assure its continuance. The union of the monarchs representing their respective people's interests offered to Europe, in their opinion, its only safe and sacred pledge of future tranquillity. The hope of the union was the maintenance of peace and the security of transactions on which peace was founded and consolidated. The basis of the union was never to turn aside from observance of the law of nations. Further meetings were to be held. The repose of the nations was to be the motive of the union at all times.

The Congress of Troppau was formed by Metternich to determine the principles on which the allies might intervene in Naples. Metternich held that Christian interests in Naples were European interests, that revolution was legitimate when initiated from above, and no intervention should be allowed, but illegitimate when enforced from below, and no such change should be recognized. Castlereagh denied these principles on the ground that the treaties did not authorize them. The representatives of Great Britain and France were not empowered to act. By a private preliminary protocol, Austria, Russia, and Prussia boldly espoused the principle of intervention: "States which have undergone a change of government due to revolution, the results of which threaten other states, *ipso facto* cease to be members of the European alliance and remain excluded from it until their

situation gives guarantees for legal order and stability. If, owing to such alterations, immediate danger threatens other states, the powers bind themselves by peaceful means, and if need be by arms, to bring back the guilty state into the bosom of the great alliance." Castlereagh refused to sign this protocol. Great Britain was neutral as regards Naples and was opposed to the general system of guarantees, territorial and political, which was abandoned at Aix-la-Chapelle. Castlereagh distinguished between the French Revolution and other revolutions. This conference adjourned to meet at Laibach so that the King of Naples might attend. Great Britain and France took a view opposed to that of the three autocratic powers, Austria, Prussia, and Russia.

The Congress of Verona was called to consider the revolutionary movement in Spain. France inquired as to the extent of allied support in case the situation should lead to war between France and Spain. Emperor Alexander of Russia held that the question was European in its interest and importance. Wellington of England urged peace with Spain and declared that Great Britain would not be a party to interference in that country. The treaty of November 22, 1822, declared that representative government was incompatible with monarchical principles, and the powers engaged "to use all their efforts to put an end to the system of representative governments in whatever country they may exist in Europe and to prevent its being introduced in those countries where it is not yet known." Freedom of the press was to be suppressed, and churchmen were to be sustained in any measures designed to preserve the authority of princes. With this bold adoption of the principle of intervention by the allied powers, Wellington withdrew from the conference.

The Holy Alliance had a real purpose which, if extended to America, clearly would have caused infinite trouble for the United States. Intervention was regarded by the continental powers as their clear right. The Spanish colonies were discussed at the Congress of Aix-la-Chapelle. Richelieu favored the establishment of a royal house in the revolting colonies. Spain refused the mediation of the allies and was excluded from the conference. France and Russia proposed that the United States be invited to a conference at Madrid to consider the question of the Spanish colonies. Richelieu hoped to attach the United States to the general system of Europe and thus to prevent rivalry and hatred between the Old and the New World; he regarded an entirely new and complete republican world as a menace to the old order. On May 13, 1818, President Monroe submitted the following ques-

tion to his cabinet: "Whether the ministers of the United States in Europe shall be instructed that the United States will not join in any project of interposition between Spain and the South Americas which should not be to promote the complete independence of these provinces; whether measures shall be taken to ascertain if this be the policy of the British government; and, if so, to establish a concert with them for the support of this policy." The American ministers to France, England, and Prussia were instructed to declare to those governments that this country would take part in no conference which would not have as its basis the absolute independence of the Spanish colonies. Russia unofficially invited the United States to become a party to the Holy Alliance. The United States expressly refused the invitation, pointing out that its political system was essentially extra-European, and that the policy of non-intervention was becoming more and more firmly riveted in the principles and opinions of the nation as the years passed.

The Canning Proposals.—Great Britain strenuously opposed the principle of intervention as applied to all revolutionary movements. She was especially hostile to the Holy Alliance. She desired a share in South American commerce which could not be gained under Spanish control. George Canning, British Secretary of State for Foreign Affairs, disclosed his views to Richard Rush, American minister to England. He pointed out that increasing difficulties surrounded the Spanish question, that the separation of the colonies from Spain had been settled by time and events, and that their recognition by Great Britain depended upon circumstances. Great Britain was not minded to take any Spanish territory in America or to agree to any French acquisitions. He urged that England and America make known to the world their views on the subject. On August 29, 1823, Canning again argued that, since the countries were agreed, their position should be published to the world. It would put at rest the ambitions of European states and would end the jealousies of Spain and the agitation in the colonies. He believed that an opportunity was never before afforded "when so small an effort of two friendly governments might produce so unequivocal a good and prevent such extensive calamities." He urged American agreement to the following propositions:

1. We conceive the recovery of the colonies by Spain to be hopeless.
2. We conceive the question of the recognition of them as independent states to be one of time and circumstances.
3. We are, however, by no means disposed to throw any impediment in the

way of an arrangement between them and the mother-country by amicable negotiations.

4. We aim not at the possession of any portion of them ourselves.

5. We could not see any portion of them transferred to any other power with indifference.

Rush replied on August 23, 1823, agreeing to Canning's propositions, but disclaiming any authority to act. President Monroe at first favored our meeting the British proposals. In order the more carefully to define his own position, he submitted Canning's proposals to Jefferson and Madison, asking three questions: (1) whether we should entangle ourselves at all in European politics and wars on the side of any power against others, presuming that a concert by agreement of the kind proposed might lead to that result? (2) whether a case could exist in which a sound maxim might and should be departed from, and whether the present instance was such a case? (3) whether or not the time had arrived when Great Britain should take her stand either on the side of the monarchs of Europe or on the side of the United States, and in consequence in favor either of despotism or of liberty? He asked if it might "not be presumed that, aware of that necessity, her government had seized upon the present occurrence as that which it deemed the most suitable to announce and mark the commencement of that career?" Jefferson regarded it as the most serious question since the establishment of independence, and advised our joining in the declaration. He asserted that the United States should oppose by all possible means the forcible interposition of any other power and especially the transfer of territory by any form of acquisition. Instead of embroiling us in British affairs, it would be getting Great Britain to propose the very policy for which we stood. Madison regarded it a matter of particularly good fortune that British and American policies coincided, even if based upon different considerations. He advised a joint declaration of policy, feeling secure that with British aid the United States would have nothing to fear from Europe.

Russian Complications.—American relations with Russia gave an opportunity for a further definition of our attitude toward European interference in the New World. The controversy was twofold. In the first place, in 1821, Russia issued a ukase claiming the Pacific Coast as far south as the fifty-first degree of north latitude, and forbidding persons engaged in fishing or trading to approach within one hundred miles of this sphere. Secretary of State Adams informed

Baron Tuyll that Russia would be resisted in any territorial establishment in the New World, and that the American continents were no longer subject to such establishments. He also advised Mr. Middleton, United States minister to Russia, that new Russian settlements would only injure the peace of the world, and that settlements by other nations must be left to American discretion. In the second place, the controversy concerned the recognition of the *de facto* governments in South America. Baron Tuyll advised that Russia would accept no agents of the *de facto* governments formed in the New World in contravention of the political principles for which Russia stood. He expressed the hope that the United States would remain neutral as regards the Spanish-American states, which meant that the United States should do nothing in case of intervention. Adams replied that Russia, on her part, should also continue to observe the same neutrality.

The Cabinet Meetings.—The declaration of the Monroe Doctrine, which was, in effect, an extended form of the policy of non-intervention, was the outcome of a cabinet meeting. The proposals of Canning were before the cabinet, and Rush had favored joining Canning in a joint declaration. Adams strenuously opposed this view. He regarded the object of Canning as an attempt "to obtain some public pledge from the government of the United States, ostensibly against the forcible interference of the Holy Alliance between Spain and South America, but really or especially against the acquisition to the United States themselves of any part of the Spanish-American possessions." Calhoun, Secretary of War, advocated giving discretionary power to Rush to join Canning in a declaration against intervention on the part of the Holy Alliance, even if the United States should be required to agree not to take Cuba or Texas. He argued that Great Britain had greater power to seize these territories, and that the United States would gain from her a similar agreement. Adams argued that the interests of the United States and Great Britain were not identical, and that a joint declaration would give Great Britain a substantial pledge against ourselves, while a refusal would leave the United States free to act as emergencies arose. Such a career, he emphasized, would subordinate the United States to Great Britain. It would concern not only the part Great Britain was to play in American affairs, but also the part we should play, especially if the revolting provinces desired membership in the American federal system. The question was, then: should the United States bind itself in regard to its future policies of the New World, or should it retain a

free hand? Adams applied the test of right and wrong to the Canning proposals. The South American states were independent nations and they alone had the right to dispose of their condition. The United States had no right to dispose of them either singly or jointly, or to dispose of any other nation without its consent. After much discussion Adams won his point, and a note was accordingly dispatched. On November 21, 1823, the Monroe message was considered. It condemned the invasion of Spain by France, and acknowledged Greek independence, with the recommendation that a minister be sent. Adams argued that we were at peace with the world and that this was a call to arms on questions essentially non-American. "Emperors, kingdoms, principalities," he said, "had been overthrown, revolutionized, and counter-revolutionized, and we had looked on safe in our distance beyond an intervening ocean, and avowing a total forbearance to interfere in any of the combinations of European politics." He also urged that, insofar as the Holy Alliance was concerned, we should meet and not make an issue. On November 25, a paper was proposed to be delivered to Baron Tuyll. "This," said Adams, "should be a firm reply both to Russia and to Canning." It should be a discussion of the principles of our political system, which he declared were both republican and pacific. The United States, he insisted, would be concerned in any European intervention, either to restore Spanish rule in America, or to introduce monarchical principles into these countries, or to transfer Spanish territory to another power. Calhoun thought that this was too great an avowal of republicanism, and that it would bring us into conflict with the Holy Alliance. Southard and Wirt, two other members of the cabinet, declared that the paper was aimed nominally at Russia but practically at the Holy Alliance. Said Wirt: "Should the Holy Alliance act in direct hostility against the revolted provinces, would the United States resist them by war?" Adams admitted this to be a serious question, but he regarded war as unlikely. The course would commit the United States only insofar as the President could act constitutionally on this point. England was in sympathy with the United States, and the restoration of Spanish Rule in South America would not be of advantage to the allied states.

On November 26, the results of former meetings were discussed, and the Spanish and Greek questions were again raised. Adams favored a change in the text of the message, declaring that any conflict with the Holy Alliance should be on strictly American grounds. The question seemed to revolve about the opposition to the Holy Alliance.

Wirt doubted whether the people of the United States would give their support in case of war. Calhoun was in favor of action of some kind. Monroe asked a pertinent question: Suppose England resisted the Allies in case they should attack South America without the aid of the United States? Adams was of the opinion that England would be victorious, and that the probability of English occupation should hasten American action. The Canning proposals, he observed, did not contemplate war, and hence there was little danger of it. On November 27, Monroe advised the omission of all objectionable paragraphs in the paper. Adams acquiesced in this but insisted that liberty, independence, and peace be set forth as the fundamental principles of our government. The object of their exposition, he declared, was "to compress into one sentence the foundation upon which the mind and heart at once could repose for our justification of the stand we are taking against the Holy Alliance." Monroe thought that the paragraph should be omitted under the circumstances.

The Doctrine Stated.—On December 2, 1823, President Monroe delivered his seventh annual message to Congress, embodying the celebrated Monroe Doctrine. In regard to the disputes between Russia and the United States concerning the Northwest Coast, he observed that the American continents, by their free and independent condition which they had affirmed and maintained, were thereafter not to be considered as subject to future colonization by any European power. He adverted to conditions in Greece but did not accord recognition. In regard to intervention in Spain and Portugal, he pointed out that our policy was strictly one of non-intervention and that war with Europe would be brought on only through an invasion or a menacing of our rights. There were, he pointed out, striking differences in the political systems of Europe and America, based upon a difference in government, and no extension of the European system to any part of the western hemisphere would be allowed by the United States. As regards existing European dependencies in America, the *status quo* would be respected and observed. Where governments had declared and maintained their independence and the United States had acquiesced therein, any intervention to oppress or in any way to control them would be met with opposition. Our policy was not to intervene in the internal concerns of the powers, and in all cases to recognize the *de facto* government as the legitimate government, and as the one with which the United States would deal. The conditions of peace with Europe, therefore, were: first, non-intervention in

European affairs by the United States, and second, non-intervention in American affairs by the powers of Europe.

The seventh paragraph of President Monroe's message has come to be known as the principle of non-colonization. It is a corollary of the principle of non-intervention. The declaration was occasioned by Russian claims to the Northwest, the circumstances of which we have already discussed. Russian pretensions to territorial rights were disputed on the ground that there had been no establishment in the territory in question except in California, and therefore her claim was groundless. A communication was addressed to Russia on July 22, 1823, setting forth the views of the United States with respect to the right of colonization. In the message Monroe expressly denied the right of European powers to acquire further territory in the Americas, either by conquest, or by cession, or by transfer from one power to another.

The Doctrine Applied.—On a number of occasions the United States has resisted threatened inroads of European countries on the Latin-American states; and in a few instances this resistance has taken the form of threats of aggressive action. During the Civil War the French Government, in seeking to collect certain claims from Mexico, occupied the country and set up a monarchy under Emperor Maximilian, of Austria. When relieved of the burdens of the Civil War the United States renewed its agitation against the French occupation and threatened war unless the troops were withdrawn. France followed this course and the empire of Maximilian came to an untimely end. The United States also protested against the Spanish re-occupation of the Republic of Santo Domingo during the Civil War. Spain found herself unable to remain in possession of the Republic and voluntarily withdrew. The most celebrated case of American opposition to pretensions of European governments in Latin-American states was that of the boundary dispute between Venezuela and British Guiana. British Guiana laid claim to certain so-called Venezuelan territory, and Venezuela applied to the United States for protection. Secretary of State Olney, in his note to Lord Salisbury, made the following imperialistic declaration: "The United States is practically sovereign on this continent and its fiat is law on the subject to which it confines its interposition." Lord Salisbury emphatically contested the validity of the contentions advanced by Mr. Olney. He denied the application of the Monroe Doctrine to the Venezuelan controversy. In due course of time an American commission was appointed with authority to de-

termine the correct boundary-line between Venezuela and British Guiana. The President was authorized to resist any attempt by Great Britain to appropriate territory beyond the line as a wilful aggression of the rights of the United States. The case was finally submitted by Great Britain and Venezuela to a tribunal of arbitration. In the final fixation of the boundary-line, possession was accepted as the determining factor, and a large number of the claims of Venezuela, through the application of the principle of prescription, were relinquished. Another Venezuelan controversy occurred in 1902 and 1903, when Germany, Great Britain, and Italy intervened for the collection of claims. The United States refused to extend the protection of the Monroe Doctrine to American countries which, under international law, refused to meet their international obligations and were therefore subject to penalties. The case was finally referred to the Permanent Court of Arbitration at The Hague, where the arbitrator awarded preferential payments to the blockading governments. This placed a premium upon the use of force in the collection of debts. Dr. Drago, the Argentine Minister of Foreign Relations, took the view that the collection of loans by military force, implying, as it did, territorial occupation to make it effective, should not be admitted by the states of America. The collection of a public debt, therefore, should not occasion armed intervention in or actual occupation of the territory of American nations by a European power. The United States has been compelled to depart from the Monroe Doctrine on a few significant occasions. In 1898 we intervened in Cuba; first, for the sake of humanity, and second, because of a condition of affairs at our doorstep which was practically intolerable. The stoppage of the barbarities and miseries which then existed was analogous to what is known in private law as the abatement of a nuisance. With the nuisance abated through the decisive intervention of the United States, our relations with Cuba were defined, and we now occupy a special position in relation to that country. Under a treaty we are authorized to intervene to preserve Cuban independence, to maintain a government which will protect lfe, property, and individual liberty, and which will discharge the obligations with respect to Cuba imposed on the United States by the Treaty of Paris. Cuba agreed not to conclude any treaty with a foreign power which would impair her independence, or which would authorize foreign powers in any manner to obtain for colonization or military purposes any control over the island. Debts are not to be contracted beyond the capacity of the Cuban budget without Amer-

ican consent. The purpose of the United States in this intervention was to preserve Cuban independence.

The United States also intervened in the struggle between Panama and Colombia in 1903. While the facts and justification of this intervention are still in dispute, it nevertheless remains that we did intervene, as President Roosevelt himself admitted, contrary to the principle of non-intervention and the principle of the *de facto* recognition of states. But, he said, like the Cuban intervention, this intervention constituted an exception to the general rule. The United States, he contended, had a mandate from civilization to build the canal, and had also engaged to do so under the Hay-Pauncefote Treaty with Great Britain. Congress had settled that the canal should be built. The reasons for our departure in this instance, he observed, embraced our treaty rights, our international interest and safety, and the interests of collective civilization. The Government of Panama was recognized, and by a treaty of November 18, 1903, we agreed to guarantee and maintain the independence of the Republic of Panama. Panama relinquished to the United States the control of sanitation and the maintenance of public order within the cities of Colon and Panama. The United States was given the right to employ measures to protect the canal, and no alteration in law, government, or treaties affecting the rights of the United States could be made without her consent. Panama granted to the United States in perpetuity a zone ten miles wide for purposes of a canal.

In 1905 a *modus vivendi* was concluded by President Roosevelt with Santo Domingo. The total debts of the Republic were about $20,000,000. Under the *modus vivendi* it was provided that bonds should be issued to this amount and that the United States should appoint a general receiver of customs. Such a receiver should have the general protection of the United States. He was to receive the customs revenues of the Republic, and to apply them to the payment of the government's domestic and foreign obligations. This supervision was continued under the treaty concluded with Santo Domingo in 1907. In 1913 commissioners were sent to supervise the Dominican elections in the capacity of free observers. In June, 1916, American forces were landed to restore order under the supervision of the United States. In June, 1922, a plan of evacuation was agreed upon between Santo Domingo and the United States. The executive posts of the government were to be assumed by Dominicans, the American military forces were to be concentrated at not more than three

places, and order was to be maintained during the tenure of office of the provisional government by the Dominican national police under the direction of the provisional government. Upon the complete establishment of peace and order, the United States will willingly withdraw.

Intervention has also been necessary in Haiti. Certain European governments demanded a settlement of claims. Between the years 1910 and 1915 a number of revolutions took place. In 1915, American forces were landed. In 1916, the Senate approved a treaty under which the United States agreed to supervise the collection and administration of customs revenues and the training of a native constabulary. Haiti agreed to enter into no agreements which would impair her independence. In 1922, the United States sent General John H. Russell to Haiti as American high commissioner to report on American administration. His report has disclosed progress. The only aim of the United States is to establish peace and stability, and upon assurance of their continuance American forces will be withdrawn.

Polk and the Doctrine.—The principle of non-intervention, or, as it is more commonly called, the Monroe Doctrine, has been discussed both as a political theory in the minds of our early statesmen, and also in the light of its practical application in foreign policy. It cannot be considered apart from its practical phases, for only its application has given it definite form and substance. Moreover, its influence as a doctrine has been growing since the days of Monroe. Every statesman since 1823 has attempted to explain and expound it. Some of these explanations have been the result of careful thinking and conviction; others have been made because it has been the fashion to make them. The contributions of American statesmen, beyond a repetition of what has been stated before, are few. President Polk, in his annual message of December 2, 1845, enlarged the meaning of the non-colonization principle. Monroe had used the terms "settlement" and "colonial establishments." Polk declared that it should be "distinctly announced to the world as our settled policy that no future European colony or dominion shall with our consent be planted or established on any part of the North American continent." This interpretation embraced the voluntary transfer of territory already under the administration of European powers. In his message of December 8, 1845, with respect to the annexation of Texas, he declared that jealousy among the powers had caused the establishment of the principle of the balance of power in Europe. "It cannot," he said, "be permitted to have any application on the North American continent, and espe-

cially to the United States.'' In case any of the independent states of this hemisphere should seek membership in the American ''confederacy,'' it would be a question for us and them to settle, without the interposition of any foreign power. An uprising in Yucatan was followed by an offer of the sovereignty of that Mexican state to the United States, England, or Spain, in return for protection. In 1848 President Polk declared, in regard to the offer to the other countries, that ''according to our established policy, we can not consent to a transfer of this 'dominion and sovereignty' to either Spain, Great Britain, or any other European power.'' He urged, on the part of the United States, the military occupation of Yucatan, and its annexation as a precautionary measure. Congress, however, did not accede to his demand.

Roosevelt and the Doctrine.—No President has had more to do with the application and modification of the Monroe Doctrine than Theodore Roosevelt. One of the first of his official acts relating to the Monroe Doctrine was the recognition of Panama in 1903. He admitted this act to be contrary to the policy of non-intervention and the *de facto* recognition of states. Our justification in the recognition did not in his opinion depend on our action in ordinary cases. He later declared that he ''took'' the canal. This statement was seized upon by Colombia, and the Panama case was re-opened. The controversy was finally settled by the treaty of 1922 between the United States and Colombia. Mr. Roosevelt was informed by Germany of the intent of that power, in concert with Great Britain and Italy, to use reprisals against Venezuela in the form of a blockade of her ports. Venezuela had repeatedly refused to adjust certain claims which were long past due. President Roosevelt declared in his annual message that the United States did not guarantee any state against punishment for wrongdoing, if the punishment did not take the form of the acquisition of territory by a non-American power. He used his influence to have the dispute submitted to arbitration. In an address delivered at Chicago on April 2, 1903, he observed that we should not espouse the quarrel of another power, but should limit our interest to the prevention of infringements on the Monroe Doctrine. In the light of assurances that nothing of the kind was intended, he had not interfered in the dispute, except to urge the contending parties to agree upon a friendly mode of settlement.

In 1905 Mr. Roosevelt was forced to deal with the responsibilities of the Monroe Doctrine in a very striking way. Steps were taken by the United States to protect its citizen claimants in Santo Domingo.

An understanding was reached whereby Santo Domingo agreed to pay four and one-half millions of dollars on terms fixed by arbitrators, in full settlement of the claims of the Santo Domingo Improvement Company and allied American companies. A financial agent was to be appointed to supervise the collection of customs revenues, which were to be devoted in part to this purpose. Due to pressure of foreign governments, they were admitted to share in the collections of the American agent. Mr. Roosevelt, in his message to the Senate on February 15, 1905, declared that those who profited by the Monroe Doctrine were obligated to accept certain responsibilities along with the rights it conferred, and that this applied to those who upheld the doctrine. He pointed out that an aggrieved nation might, under international law, take action to secure an adjustment of its disputes without violating the Monroe Doctrine, if the action taken did not interfere with the form of government or amount to an acquisition of territory. To collect a money claim, however, the aggrieved nation could resort finally only to a blockade, a bombardment, or the seizure of customs-houses. This would be a possession of territory, even though temporary. To leave the debtor state to its fate might mean the loss of its independence and the violation of the Monroe Doctrine. To intervene in its behalf against the European creditor state would be denying such states their clear right under international law, and might lead to war. To intervene in behalf of the debtor state and the creditors, at the request of the unfortunate debtor state, would be an advantage to all parties concerned. On these grounds he justified the protocol of 1905. Two years later a convention was ratified by the Senate, agreeing substantially to the terms of the protocol.

In 1906, the Cuban government requested the intervention of the United States under the treaty of 1903. A civil government was established after the American provisional government had taken over the administration. In 1909, after order and stability had been established, American forces were withdrawn. President Roosevelt dealt firmly and boldly with the responsibility of the United States under the Monroe Doctrine when states to which it applied refused or neglected to live up to their obligations under international law. He realized that some modifications in the doctrine had to be made. These he made, with the result that the claims of foreign states have been adjusted, their independence preserved, and the Monroe Doctrine honorably maintained. In asserting this principle, he declared in his annual message of December 4, 1904:

Any country whose people conduct themselves well can count upon our hearty friendship. If a nation shows that it knows how to act with reasonable efficiency and decency in social and political matters, if it keeps order and pays its obligations, it need fear no interference from the United States. Chronic wrongdoing, or an impetus which results in a general loosening of the ties of civilized society, may in America, as elsewhere, ultimately require intervention by some civilized nation, and in the Western Hemisphere the adherence of the United States to the Monroe Doctrine may force the United States, however reluctantly, in flagrant cases of such wrongdoing or impotence, to the exercise of an international police power. . . . It is a mere truism to say that every nation, whether in America or anywhere else, which desires to maintain its freedom, its independence, must ultimately realize that the right of such independence cannot be separated from the responsibility of making good use of it.

Taft and the Doctrine.—The contributions of William Howard Taft to the Monroe Doctrine were more modest, because of the paucity of situations during his administration which required its application, and in part because of the conservative temperament of the man. As Secretary of War under Roosevelt, he had declared that the Monroe Doctrine would be transformed from a negative into a positive doctrine. He refused to recognize the Zelaya government in Nicaragua, first, because it had violated the spirit of the Washington conventions of 1907, and second, because American citizens engaged in the military service of the enemy had been assassinated. He has cautioned that the United States should avoid all acts which give rise to a misconstruction of her motives, or which might indicate an enforcement of the Monroe Doctrine for purposes of selfish aggrandizement. He held Roosevelt's view as to intervention in the interests of the Latin-American states themselves. He declared:

Now, when we properly may, with the consent of those in authority in such governments and without too much sacrifice on our part, aid those governments in bringing about stability and law and order, without involving ourselves in their civil wars, it is proper national policy for us to do so. It is not only proper national policy but it is international philanthropy. We owe as much as the fortunate man owes aid to the unfortunate in the same neighborhood and in the same community. We are international trustees of the prosperity we have and the power we enjoy, and we are in duty bound to use them when it is both convenient and proper to help our neighbors. When this help prevents the happening of events that may prove to be an acute violation of the Monroe Doctrine by European governments, our duty in this regard is only increased and amplified.

Wilson and the Doctrine.—President Wilson gave a certain direction to the Monroe Doctrine at various times during his stirring administrations. He attacked especially the tendency of Americans to exact certain concessions from the Latin-American states. In a celebrated address before the Southern Commercial Congress he paid his respects to "the material interests that had influenced the foreign policy of certain governments in their relations with the nations of Latin America." Our duty, he declared, was to assist the nations of this hemisphere in their emancipation from the material interests of other nations, so that they might enjoy their constitutional liberty unrestrained. He observed: "You hear of concessions to foreign capital in Latin America. . . . States that are obliged to grant concessions are in the position that foreign interests are apt to dominate their affairs. Such a state of things is apt to become intolerable. It is emancipation from this inevitable subordination that we deem it our duty to assist." In the same address he asserted that our aims were peaceful and that we were not interested in further territorial acquisitions. "The United States," he said, "will never seek one foot of additional territory by conquest, . . . and she must regard it as one of the duties of friendship to see that from no quarter are material interests made superior to human liberty and national opportunity." He further placed our relations with the states of Latin America on high moral grounds. "Do not think, . . ." he said, "that the questions of the day are mere questions of policy and diplomacy. They are shot through with the principles of life. We dare not turn from the principle that morality and not expediency is the thing that must guide us and that we will never condone iniquity because it is most convenient to do so." In later addresses he pointed out that the assumption by the United States of a guardianship over the Latin-American states must give way to a spiritual partnership, and that the states of America were not hostile rivals, but coöperating friends. He also pointed out that until then the states of America had been in doubt as to the use the United States would make of its power and of its position of primacy on this hemisphere. Such doubt, he declared, must be removed. In order to "establish the foundations of amity," he suggested at the Second Pan-American Scientific Congress, held in Washington on January 6, 1916, that the Latin-American states guarantee to each other their political independence and territorial integrity; that pending disputes be speedily and amicably settled; that future disputes be settled by arbitration; and that revolutionary expeditions or shipments of munitions should not leave the shore of

one American state for use in war against another. In dealing with Mexico, he steadily refused to recognize the Huerta government, on the ground that it was based on assassination. On certain occasions he intervened, both through diplomacy and by force, to sustain a given order of things which he thought should obtain there.

Europe and the Doctrine.—The influence of European opinion on the Monroe Doctrine is important here. We have seen that Great Britain agreed to the main principles, and suggested a joint declaration. We have had unpleasant relations with certain European states in inducing them to observe the principle of non-intervention. Save on one or two occasions we have refused to join European states in declarations of policy, or in friendly or hostile action relating to American questions or American states. Moreover, our associations with the states of the world in the interests of the peaceful settlement of international disputes and world peace have always been attended with the express exception of the Monroe Doctrine as coming within the authority of the conferences. The American Delegation to the First Hague Conference, upon signing the convention for the settlement of international disputes, made the following declaration: "Nothing contained in this Convention shall be so construed as to require the United States of America to depart from its traditional policy of not intruding upon, interfering with, or entanglng itself in the political questions or policy of internal administration of any foreign state; nor shall anything contained in the said Convention be construed to imply a relinquishment by the United States of America of its traditional attitude toward purely American questions." The powers signed a convention at the Second Hague Conference in 1907 respecting the limitation of the use of force for the recovery of contract debts. It provides in part:

> The contracting powers agree not to have recourse to armed force for the recovery of contract debts claimed from the government of one country by the government of another country as being due its nationals.
>
> This undertaking is, however, not applicable when the debtor state refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any *comprimis* from being agreed on, or, after the arbitration, fails to submit to the award.

The League of Nations and the Doctrine.—Under the Covenant of the League of Nations the Monroe Doctrine is referred to as a "regional understanding." The Covenant reads: "Nothing in this Covenant shall be deemed to affect the validity of international

engagements such as treaties of arbitration nor regional understandings like the Monroe Doctrine." President Wilson, who secured this reservation, had previously declared that the Monroe Doctrine was an American policy. In the campaign for the ratification of the Treaty of Versailles and the League Covenant, it was urged that the Monroe Doctrine would, in case of our adherence, be scrapped. One of the reservations attached by the Senate majority to the Covenant of the League of Nations, was to the effect that the Monroe Doctrine was to be interpreted by the United States alone, and was wholly outside the jurisdiction of the League. A certain danger arises from Latin-American membership in the League of Nations. All except Mexico and Ecuador are members. Brazil has given notice of her intent to withdraw. Their representatives have occupied posts of influence. To what extent will American questions be settled by the League of Nations? Bolivia and Peru asked the League of Nations to consider the Tacna-Arica controversy. Many Americans fear that problems of the Western Hemisphere will be transferred from America to Geneva for settlement, and that the leadership of the United States under the Monroe Doctrine will be destroyed. Indeed, some writers assert that we refuse to enter the League of Nations because the power we would surrender would be greater than the power we would gain!

An Exclusive Foreign Policy of the United States.—The Monroe Doctrine, while benefiting the Latin-American states generally, is purely a foreign policy of the United States. We have reserved the full right to declare, interpret, and apply it. The United States was invited to participate in the Panama Congress of 1826. President John Quincy Adams declared in a special message to Congress, December 26, 1825, that "an agreement between all the parties represented at the meeting that each will guard by its own means against the establishment of any future European colony within its border may be found advisable." The American representatives did not arrive in time for the meetings of the Congress. The Congress instructed on April 18, 1826, that the United States should be represented only in a diplomatic character, and that no alliance, offensive or defensive, and no negotiations for such an engagement, should be undertaken with all or any of the South American republics. Mr. Poinsett, Minister to Mexico, told Mr. Alaman, Mexican Secretary of State, that the friendly disposition of the United States toward the Spanish-American countries did not confer upon Mexico the privilege of demanding the interference of the United States as a right. In 1832

the United States found it necessary to terminate an intolerable situation in the Falkland Islands, then claimed by the United States of Buenos Aires. One Vernet had captured some American vessels and had committed further aggressions against the property of American citizens. Buenos Aires refused to act in the case. An American squadron broke up the settlement, on the ground of necessary self-defense. The American government refused to discuss this case until the question of title was settled between England and Buenos Aires. The latter government contended that the United States had complicated its claim to the islands, and through its naval action had itself violated the Monroe Doctrine. British occupation was also said to be such a violation, which the United States should resist rather than encourage. The American Government replied that British violations of the Monroe Doctrine must be judged by the United States, and that no government had the right to demand redress from the United States for injuries alleged to have resulted from its failure to act. The Monroe Doctrine did not, it was pointed out, apply to titles which antedated the doctrine itself. No nation could demand our enforcement of the Monroe Doctrine, nor could damages be claimed due to inaction by the United States. Moreover, the United States, as an independent nation, without regard to the question of jurisdiction, could abate any nuisance involving lawless aggressions upon the persons and property of its citizens.

At the Third Pan-American Conference, held at Buenos Aires in 1910, informal discussions took place regarding the Monroe Doctrine. The Brazilian delegation wanted to pass a resolution declaring that the Latin-American nations had benefited by the Monroe Doctrine, and that it was recognized as a permanent factor making for international peace on the American continent. Chile did not favor so complete a recognition. She suggested that the United States be notified that the principles of non-interference and of non-colonization had contributed toward the guarantee of the independence of the Latin-American states, and that the southern nations gave their adhesion to that "idea of solidarity." After conference with the Argentine delegation, the following resolution was drafted: "Upon celebrating the centennial of their first efforts toward political independence the nations represented in the Fourth Pan-American Conference send to their great sister nation of the North the expression of their thanks, and record the conviction that the declarations contained in the message of President Monroe met the aims of all America, and contributed effectively to guarantee its independence." In view of the

fact that the resolution might cause a rift in the Congress, the delegation of the United States advised against pushing it. The nations, therefore, were unable to state an interpretation of the doctrine in a manner acceptable to all, without being misunderstood by the powers of Europe, and perhaps even by the United States.

At the Fifth Pan-American Conference, held in Santiago de Chile in 1923, a project was presented which involved the continentalizing of the Monroe Doctrine. To the states to the south of the United States it seems a logical proposition that a doctrine operating for the benefit of all should be interpreted, defined, and applied by all. Moreover, if all had a voice in its application it would have the greater support. The United States delegation replied in each case that the Monroe Doctrine was unilateral, and that it was expressly a foreign policy of the United States. This gave rise to a number of discussions having to do with the celebration of the one hundredth anniversary of the announcement of the doctrine. In an address delivered at Minneapolis on August 30, 1923, Secretary of State Hughes declared: "As the policy embodied in the Monroe Doctrine is distinctly the policy of the United States, the government of the United States reserves to itself its definition, interpretation, and application. . . . This implies neither suspicion nor estrangement. It simply means that the United States is asserting a separate national right of self-defense, and that in the exercise of this right it must have an unhampered discretion."

Latin-American Opinion.—It is also important to obtain the views of the publicists of Latin America in regard to the Monroe Doctrine. They, like the publicists of the United States, have all the good points of persons of their natural environment. Too frequently the persons charged with the administration of American foreign policies do not take into account the views of the statesmen of Latin America. While the Monroe Doctrine is essentially an American policy, yet it vitally affects the interests of every people and nation on the Western Hemisphere. Professor Alejandro Alvarez, a distinguished Chilean publicist, has classified the declarations of the Latin-American statesmen under five headings.

In the first place, there is one group which gives to the Monroe Doctrine its true meaning and considers that it has been beneficial to America. Señors Drago and Lastarria are representatives of this group. A second category confuses the Monroe Doctrine with the policy of imperialism and hegemony, and openly condemns it as an aggressive act on the part of the United States against the smaller

states of Latin America. Such writers are Policarpo Bonilla and Garcia Calderon. A third class considers the Monroe Doctrine jointly with the policy of imperialism and hegemony, with the result of producing confusion in the mind of the reader. Most of the publicists and professors of international law in Latin America, declares Dr. Alvarez, take this view. Another class makes a proper distinction between the Monroe Doctrine and the policy of imperialism and hegemony. Dr. Alvarez himself represents this class. A fifth group declares that the Monroe Doctrine has had its day, and that the larger countries of Latin America, such as Argentina, Brazil, Chile, Uruguay, and Peru, do not need it. This group is represented by Dr. Zeballos of the University of Buenos Aires and Dr. Martinez of the University of Chile. Dr. Alvarez, in setting forth his views, declares that there are two separate policies, often merged into one. The first is the policy of the maintenance, application, and development of the Monroe Doctrine. In cases coming under this principle, the United States has declared the aspirations of all America. In the second place, it is a policy of imperialism and hegemony, which he describes as a personal policy. It is sometimes in the interests of the United States alone; it is sometimes a logical consequence of the Monroe Doctrine; and it is sometimes designed to maintain the peace of certain regions of the American continent.

Dr. Drago was the father of the so-called "Drago Doctrine." Señor Drago communicated his views to the United States Government in regard to the forcible collection of debts in the Latin-American states. He took the ground that proceedings for the execution of a judgment against a state could not be instituted; that a sovereign state had the right to determine the time and mode of payment; that ability to pay often must await increase in wealth; that the collection of loans by military means implied territorial occupation to make them effective; and that the South-American nations, while not exempt from the obligations of states under international law, should insist on the principle that a public debt of a country should not occasion armed intervention nor even the actual occupation of the territory of American nations by a European power. In reply, Mr. Hay, Secretary of State, referred to President Roosevelt's message of December 3, 1901, in which he set forth that no guarantee against punishment could be given to any state misconducting itself. Mr. Hay excepted the question of territory. The Argentine government was informed that the United States strongly favored the reference of all claims by one state against another, growing out of individual wrongs or national obliga-

tions to an impartial tribunal. This was broader than the Drago proposal, which referred to public debts alone.

The Doctrine Analyzed—A Century's Growth.—In order to understand the more recent status of the Monroe Doctrine, it is well to advert to two addresses made by Charles Evans Hughes, then Secretary of State, on two of the occasions which celebrated the one hundredth anniversary of Monroe's famous message. One address was before the American Bar Association at Minneapolis on August 30, 1923. He took up certain points which, in the light of a century's growth and of contemporary developments, he thought deserving of special emphasis at the time. In the first place, he asserted that the Monroe Doctrine was not a policy of aggression, but a policy of self-defense. While announced at the time when the danger of foreign aggression was very real, the achievements of a century had not altered its scope or changed its basis; it was still an assertion of the principles of national security. In support of this interpretation, he mentioned the Lodge Resolution passed by the United States Senate in 1912, which provided "that when any harbor or other place in the American continent is so situated that the occupation thereof for naval or military purposes might threaten the communication or the safety of the United States, the government of the United States could not see without grave concern possession of such harbor or other place by any corporation or association which has such a relation to another government, not American, as to give that government practical power or control for naval or military purposes."

A second proposition was to the effect that the United States reserved to itself the right to define, interpret, and apply the Monroe Doctrine. The United States has rejoiced in the recognition of the facts and the soundness of the policy, but it must be maintained upon her own responsibility. The United States has refused to bind itself by its own declaration as to any course of action contrary to the principles of the Monroe Doctrine. The Monroe Doctrine, in the third place, does not infringe upon the independence or sovereignty of other American states. There is no design of encroachment or control, nor does the United States seek to establish a protectorate over the Latin-American states. Special situations may require special applications of the principle of non-intervention. But the purpose of intervention, if it must come, is to preserve rather than to violate the Monroe Doctrine. In the fourth place, Mr. Hughes took up certain modern conditions and recent events which had required either departure from the Monroe Doctrine or a certain modification of its original terms.

The Cuban and Panama interventions were cited as exceptions to the general rule of non-intervention, which required immediate action of the United States. These were neighborhood problems which would demand action in the ordinary course of events with or without a Monroe Doctrine. Our interventions, conventional and *de facto,* in Santo Domingo, Haiti, and some of the republics of Central America, are designed to restore order, peace, and stability. Without the intervention of the United States it seems probable that European intervention would have resulted in a temporary occupation of territory through the administration of customs and the possession of custom houses.

A fifth observation was to the effect that the Monroe Doctrine did not stand in the way of Latin-American coöperation. Indeed, the concepts of independence and security were guaranteed by it. Moreover, the Monroe Doctrine was not an obstacle to wider international cooperation beyond the limit of American aims and interests, whenever such coöperation is congenial to American institutions. The United States and the states of Latin America were free to have such relations as they desired with other states and regions of the world.

One of the most celebrated addresses on any subject bearing on foreign affairs was delivered by Secretary Hughes under the auspices of the American Academy of Political and Social Science on November 30, 1923. This is regarded as the principal address of the American nation in commemoration of the century of the Monroe Doctrine. He set forth the current relations of the United States with two main regions of the world, namely, Europe and the Far East. The Monroe Doctrine, he declared, did not interfere or conflict with our relations with those regions of the world, nor was the application of different policies to different regions inconsistent or illogical. The Doctrine, he declared, was a principle of exclusion and embodied a policy of self-defense on the part of the United States. While recognized as a policy of the United States and maintained for its own security, it had rendered distinguished service to the states of America in preventing the rivalries of European powers. Each state might adopt the same or similar policies for itself, and the United States was gratified when any state acquiesced in these principles. It was in effect a principle of opposition to action by non-American powers. The American continents were thus left free from intervention. The principle did not define American policies within this hemisphere with respect to other matters. There were certain affirmative policies, to which the United States was a party, which defined and governed our

relations with the American republics, and they were the fitting complement of the principle of exclusion embodied in the Monroe Doctrine. One such affirmative policy was the equality of the American republics, implying equal rights under the law of nations. Again, the United States respected the integrity of the Latin-American republics. We had no policy of aggression, nor did we support aggressive policies on the part of other people. The United States held that the states have duties as well as rights, and that every state, upon admission "accepts the obligations essential to sound international intercourse." Among such obligations was the duty of each state to respect the rights of citizens of other states within its jurisdiction and in accordance with its laws. The government of the United States used its good offices to encourage the stability of governments in the southern republics when afflicted with disturbed conditions. In doing so, however, the United States did not threaten independence, but sought to preserve it. Again, the United States aimed to promote the peaceful settlement of international disputes on this hemisphere. It therefore encouraged the use of arbitration in all cases where it might be applied. The American Government, again interested in peace, had encouraged the making of agreements having in mind the limitation of armaments. This would have the dual effect of reducing expenditures and promoting peace. The object of these policies was not to secure peace as an end in itself, but to make available the opportunities of peace; and that meant opening the way to a mutual coöperation. This, Mr. Hughes declared, was realized through the Pan-American Conferences. In our commercial relations, he observed, the United States sought the most-favored-nation treatment in customs matters. Thus, the United States had led in liberal commercial policies. Finally, he pointed out that there were certain special policies of great importance to the United States. One had to do with the Panama Canal. It was commercially essential to American progress, and adverse control of it would threaten our peace and security. Under all circumstances, therefore, the United States would safeguard the Panama Canal. In the Caribbean region the United States did not seek to control the people of that region, but to secure the Caribbean nations and the United States against any possible menace. Our interest in Cuba was limited to that of friendly counsel and to the maintenance of independence in case of danger. These Mr. Hughes enunciated as the affirmative policies of the United States in this hemisphere. In closing he declared:

The Monroe Doctrine stands, as it has always stood, as an essential part of our defensive policy, but we are no less but rather more, interested in the use of the opportunity which it created and has conserved. We desire no less than they themselves, the independence, the peace and progress of all the American Republics, and we seek to enjoy to the fullest extent possible the blessings bestowed by the spirit of con-fraternity, those mutual benefits which should result from our intimate association and our common political ideals.

II. Pan-Americanism

The Meaning of Pan-Americanism.—One of the affirmative policies of the United States in its relations with the independent states of the western world is Pan-Americanism. That the policy exists and has the cordial support of the nations of this hemisphere, no one can or will deny. What it is and means is a more troublesome question. Since its vitality and life depend upon the good-will and accord of the states of Pan-America, the opinion of other states is fully as important as that of the United States. The Monroe Doctrine, a principle of exclusion and a defensive policy of the United States, may and often does exist without the cordial support of our sister republics to the south. Indeed, they are often openly hostile in their attitude toward it. The spirit and fact of Pan-Americanism is impossible without the substantial agreement of the Latin-American states.

Pan-America is not a term embracing a group of political entities bound together by formal ties. There is clearly no Pan-American constitution, oral or written, statutory or customary. Each state has its own constitution, its own political organization, laws, territory, and jurisdiction. There is no limitation, generally speaking, on their internal sovereignty. Pan-America cannot be classified as a single state, or as a federal union. Moreover, this community of states cannot be said to constitute a confederation. While the members of a confederation may in theory withdraw at will, and while it is only a voluntary association for purposes of convenience, yet the component parts of this, the weakest of all political associations, do not have an international existence while they remain under the instrument of government which binds the confederated units together. If an international association, it must be something other than an alliance. While the conferences represented by the movement have resulted in important treaties and conventions, they have not had the result of

forming alliances. There are no treaties of alliance, offensive, defensive, or both, and hence there is no Pan-American alliance. It is, clearly, a union of states, but not in the sense that the United States is such a union; or that the Confederate States were such a union; or that the European states under their system of alliances are such a union; or that the European concert is such a union; or that the League of Nations, of which most of the Pan-American states are members, is such a union. Of one fact we are certain—that the union consists of the independent states of the New World. Pan-Americanism deals with the continent as a whole only through these independent states. It is bound together neither by constitution, nor by charter, compact, alliance, treaty, or covenant. Yet it is something very real, and has foundations much stronger than the sanctions of written instruments.

The views of the leading statesmen of Latin America have been friendly to the idea and the practice of Pan-Americanism. Señor Maia, a representative of the Brazilian independence movement, wrote to Jefferson in 1787 that "nature in making us inhabitants of the same continent has in some sort united us in the bonds of a common patriotism." Señor Luis M. Drago, the distinguished Argentine publicist, has declared that America "has been constituted a separate political factor, a new and a vast theater for the development of the human race, which will serve as a counterpoise to the great civilizations of the other hemisphere, and so maintain the equilibrium of the world." American greatness would lie, he declared, not "in conquest and displacement, but in collaboration and solidarity." Señor Nabuco, one of Brazil's greatest diplomats, declared, upon the occasion of the laying of the cornerstone of the Pan-American Building at Washington: "The more impressive is the scene as these countries with all possible differences between them in size and population, have established their union on the basis of the most absolute equality. Here the vote of the smallest balances the vote of the greatest. So many sovereign states would not have been drawn so spontaneously and so strongly together, as if by irresistible force, if there did not exist throughout them, at the bottom or at the top of each national conscience, the feeling of a destiny common to all America." The occasion was one "of twenty-one nations, of different languages, building together a house for their common deliberations." Manoel de Oliveira Lima, of Brazil, declared at the Williamstown Institute of Politics in 1922: "Pan-Americanism is to be and will be a continental doctrine. It is not merely a catch-word, but lies at the root

of the greatness of the New World as a continent of peace and progress." Raymundo Wilmart, in discussing the function of Pan-Americanism, has declared: "The small nations should democratize the international community. Pan-Americanism has a beautiful task to perform."

Just as a number of Latin-American writers direct their literary darts against the Monroe Doctrine, so a few publicists of this region belittle Pan-Americanism as a sham and a veneer for the real Monroe Doctrine. For example, Marcial Martinez, Chilean author and diplomat, has asserted that the Monroe Doctrine has hitherto been limited in its application to the shores of the Caribbean Sea, but "the new phase of the American policy designated by the name of Pan-Americanism has nothing, absolutely nothing, to do with Monroeism. It is a conception tending to bind all America to the destiny of the United States." His opinion, fairly representative of the group of men to which he adheres, is further forcibly expressed as follows:

> To say it in a spirit of moderation, the American purpose is to conquer these countries by means of economic *penetration*. To this end this pretentious word *Pan-Americanism* has been created, instead of employing the simpler though more appropriate term *Americanism*. What is the meaning of the term "Pan"? I understand it means aggregation, to knead, to unite, to consolidate, to combine. But that term has been employed in world policy to denote the union of a race, and of various peoples under the hegemony of a great Power. In this sense we say Pan-Slavism to denote that the Slavic race clusters around Russia, Pan-Germanism to produce the same phenomenon of a German union under the leadership of Prussia. For the same reason *Pan-Americanism* must mean the federation of America, acknowledging as its obvious leader the hegemony of the United States.

The interpretation of the statesmen of the United States, as well as the dictates of reason and experience, disprove the artful but illogical statements of Señor Martinez. Secretary of State Robert Lansing came perhaps nearer to the truth than any other statesman in defining the more practical and less sentimental meanings of the term. It is, he said, a coöperation based on our understanding of one another and of our several needs. This, he believed would require a study of one another's material and intellectual development, and of the processes of thought of the different countries in dealing with their legal, economic, and educational questions. "Pan-Americanism," he said, "extends beyond the sphere of politics and finds its application in the varied fields of human enterprise." The spiritual side of Pan-

Americanism found its most eloquent expounder in President Woodrow Wilson. To him it was a bond of friendly association and a manifestation of comradeship. It had nothing of the suggestion of power. Indeed, Wilson would have had the United States take heed as to its words and deeds, in order that its attitude and purpose, as expressed by him, might not be misunderstood. He placed Pan-Americanism, as he placed the Monroe Doctrine, upon a high spiritual plane. "We must," he said, "show ourselves friends by comprehending their interest whether it squares with our own interest or not. It is a very perilous thing to determine the foreign policy of a nation in the terms of material interest. It is not only unfair to those with whom you are dealing, but it is degrading as regards your own actions." On the occasion of his third annual address to Congress, President Wilson outlined his view of Pan-Americanism in some detail. He significantly declared:

> The moral is, that the states of America are not hostile rivals but cooperating friends, and that their growing sense of community of interest, alike in matters political and in matters economic, is likely to give them a new significance as factors in international affairs and in the political history of the world. It presents them as in a very deep and true sense a unit in world affairs, spiritual partners, standing together because thinking together, quick with common sympathies and common ideals. Separated they are subject to all the cross-currents of the confused politics of a world of hostile rivalries; united in spirit and purpose they cannot be disappointed of their peaceful destiny. This is Pan-Americanism. It has none of the spirit of empire in it. It is the embodiment, the effectual embodiment, of the spirit of law and independence and liberty and mutual service.

Secretary of State Hughes had to deal with certain situations related to the principle of Pan-Americanism. Most of these situations were again faced by the United States when the burden of the World War had lifted. Mr. Hughes has effectively defined Pan-Americanism as follows:

> The policies which have been described are not to secure peace as an end in itself, but to make available the opportunities of peace; that is, to open the way to a mutually helpful coöperation. This is the object of the Pan-American conferences. These will be increasingly helpful as they become more and more practical. The object is to create the opportunity for friendly contact, to develop a better appreciation of mutual interests and to find particular methods by which beneficial intercourse can be aided. This bears directly upon the facilitation of exchanges, the protection of

health, the promotion of education and commerce and the developing of all necessary agencies for disseminating information and for improving means of communication. With peace assured and apprehensions allayed, it will inevitably be found that there is less diversity of interest than had been supposed and that there is an ever-widening opportunity for working together for the common good.

Professor Joseph Byrne Lockey, in his admirable book, *Pan-Americanism: Its Beginnings,* has brought together the loose threads of Pan-Americanism in eminently clear and logical fashion. The lexicographers, he says, suggest such terms as idea, principle, tendency, aspiration, doctrine, advocacy, sentiment, which might be regarded as an equivalent of what the people of the western world have in mind. It cannot be said to be an international policy of the Americas, but it does indicate a certain concert of action through agreement. The organs of Pan-Americanism—The Pan American Union and the Pan-American Conferences—are not sufficient to give effect to a strong international policy. It has this import only as the foreign offices of the Pan-American countries and the governments affected make it so. Pan-Americanism, says Dr. Lockey, lies back of these conferences. Various publicists have described the states of the New World as a "continental system," a "separate political factor," a "unit in world affairs," and an "American state system." These terms imply a sort of union. An American state system would imply some sort of international government through a constitution, compact, alliance, or treaty. There has been no instrument or organ of international government in the New World. The Pan-American Union is only a bureau, and the International American Conferences fall far short of international organization or government. Back of these one finds a moral union of the American states, based upon a set of clearly-defined principles. Pan-Americanism may be defined as a community of sentiment existing between the states of the New World and having for its purpose closer coöperation commercially, culturally, and to a more limited extent, politically. It rests, according to Dr. Lockey, upon these foundations:[1]

1. *Independence.* By this is meant complete political separation from Europe, the American states neither interfering in the affairs of the European states, nor allowing those states to interfere in their own affairs. If the lines of political connection with Europe had been maintained, obviously there

[1] *American Journal of International Law,* January, 1925, pp. 116–117. See also Lockey, *Pan-Americanism: Its Beginnings,* pp. 33–35.

could have been no American state system, and naturally no Pan-Americanism.

2. *Representative Government.* The fact that all American states have cherished from the beginning of their existence a common political ideal, the ideal of popular, representative government, has been and is a powerful bond of union between them.

3. *Territorial integrity.* The states of this hemisphere are a unit in declaring that conquest is inadmissible in American public law. The fact that the boundaries between the Hispanic-American States remain today practically as determined by the *uti possidetis* of 1810, is evidence of the force of this principle. The repeated declarations of the United States to the effect that it neither conveys the territory of its neighbors, nor seeks to aggrandize itself by conquest give additional sanction to the rule.

4. *Law instead of force.* There is no balance of power in America, no group of powerful states imposing its decisions by force upon weaker states. Action in the International American Conferences is taken by unanimous consent, and this rule precludes the development of a balance of power. The spirit of just law, as Blaine expressed it, is the rule of administration between American states.

5. *Non-intervention.* This follows as a corollary of the foregoing principle. The American states as a body have never undertaken to intervene in the affairs of any particular state. Through the American Institute of International Law they have officially declared that "every nation has the right of independence in the sense that it has the right to the pursuit of happiness and is free to develop itself without interference or control from other states." From the strict observance of this principle the American states as a body have never departed. The United States individually has on occasion intervened, but not in a spirit of denial of the principle; rather at bottom and ultimately to maintain it unimpaired.

6. *Equality.* Not only do the American states recognize equality as a principle of international law, but in the conduct of their international conferences they observe it to the fullest extent, presenting in this respect a striking contrast to the European practice. In respect of certain of the weaker republics, it is true, the United States has undertaken the exercise of international police power in such form as to infringe apparently the equality of the states concerned. But as in the case of the preceding principle, the ultimate aim is to maintain rather than to deny the principle.

7. *Coöperation.* Friendly coöperation in the advancement of common political, economic, and cultural interests is a notable characteristic of the American state system. The Pan-American Union at Washington, itself a striking example of coöperation, provides an agency for the further promotion of coöperation, an agency the transcendent importance of which we have hardly as yet begun to realize.

Pan-American Conferences.—Several projects of continental union have engaged the earnest attention of the states of Latin America. Some of the leaders of these states have sought such a union in order more effectively to realize their military and political ambitions, while some have desired union for its own sake. We are concerned only with such movements of or toward coöperation as involve the United States of America. The call for the first conference came from the great Bolivar. He had spoken and written in regard to a political union of the American states, but his efforts in this direction did not yield the results he wanted. On December 7, 1824, he sent a circular letter to the independent states of America, once under Spanish dominion, asking them to participate in an "assembly of plenipotentiaries" to be held at Panama. Later the United States and Mexico were invited. Great Britain was the only European power invited to attend. The Congress of Panama opened its sessions on June 22, 1826, and adjourned on July 15, with the understanding that it should reconvene at Tacubaya, Mexico. Peru, Colombia, Central America, and Mexico were the only Latin-American states having representatives in attendance. This was due to various reasons. The British representative was in faithful attendance. The American delegates were Richard C. Anderson and John Sergeant. A debate over the appropriation for the mission delayed their departure. Anderson, who was United States Minister to Colombia, died on the way. Sergeant did not go to Panama at all, but went to Mexico with the intention of attending the adjourned sessions. He soon returned to the United States, as the Congress did not meet again.

The Congress was in many respects a disappointment. The aims of Bolivar threw a shadow over it from the start. The lack of representation did not have the effect of making it a unanimous movement. President John Quincy Adams, while disappointed in the results, entirely sympathized with the movement, which he described as great, benevolent, and humane. Clay thought that it would be a significant event in the progress of human events. He declared: "The fact itself, whatever may be the issues of the conferences of such a congress, cannot fail to challenge the attention of the civilized world and to command that of posterity." Bolivar was still more disappointed, for the idea and the movement were his children. But they were a half-century ahead of their time. The Pan-American movement of today is different from that which began one hundred years ago, but it rests upon the same foundations. It must be and is concerned with

common interests, aspirations, and hopes. Indeed, Bolivar was ahead of the Pan-American movement of today, for his scheme would have established a league of peace and international coöperation with a greater sanction than the present movement contemplates.

The work of the Congress is worthy of note, for at this writing its work is approximately one hundred years old. Four conventions were agreed upon. One was a treaty of perpetual union, league, and confederation, based upon a number of preliminary treaties. Another arranged for future meetings, and fixed the qualifications of members of the Congress, and the constitution and procedure of the future meetings. A military convention fixed the quotas of men and money which each republic should contribute to a permanent army and navy. A final agreement, confidential in nature, dealt with the organization and movements of the army and navy. The treaty of union, league, and confederation dealt with such questions as the common defense and the peaceful settlement of disputes. No right was given to intervene in the domestic affairs of the member states, nor were the foreign relations of any of the members to be restricted. A change in form of government would result in a temporary exclusion from the confederation. The character of the Congress was intended to be diplomatic, with these objects in view: (1) to negotiate treaties and conventions which would improve mutual and reciprocal relations; (2) to maintain a "friendly and unalterable peace" by serving as a council in times of great stress, as a point of contact in common dangers, as a faithful interpreter of conventions and treaties in cases of doubt as to their construction, and as a conciliator in case of controversies and differences; (3) to secure conciliation or mediation in case of a war or rupture between the confederation or its members and foreign states; and (4) to adjust and conclude all agreements between member-states of the confederation and foreign states having the effect of ending a war between them. The contracting parties agreed to articles under which they bound themselves to uphold and defend the integrity of their respective territories. Force would be used to repel colonial establishments. Special conventions would agree upon the several frontiers, and their defense would be the object of the confederation. The meetings of the Congress were to be held every two years in time of peace, and every year in time of war. Colombia was the only state to ratify these conventions. Their significance does not lie in their adoption, for in this sense they failed; but they were the beginnings of the movement of Pan-American solidarity, and in them are to be found the basic elements of every league

of peace or plan of international coöperation ever conceived or applied by man.

The first of the great International American Conferences assembled at Washington on October 2, 1889, and continued its sessions until April 19, 1890. After the Civil War the states of this continent became of increasing interest and importance to the United States. The pretentious statements antedating the Civil War under the Monroe Doctrine's cover, yielded to a more balanced, sane, and considerate attitude. Instead of a continent with the United States as a dictator and unwelcome protector, there was substituted the conception of a union, though informal and unofficial, of the independent American states, based on the principle of equality. Everywhere there was a desire to give this conception definite form, and substance. Moreover, a method was sought whereby the continued application of such a conception might be secured. The heart of the movement was the great James G. Blaine, who had been, in and out of season, America's greatest apostle of Pan-Americanism. Some of the ground had been broken by Henry Clay before him, but the first constructive efforts were to be the work of Blaine. He had served as Secretary of State under Garfield, and had undertaken the preliminary work of a Pan-American Conference. Garfield's death was followed by the resignation of Blaine from the Arthur cabinet, and the reversal of some of Blaine's most cherished plans. When he became Secretary of State again he could once more take up the work of Pan-American accord. He was the presiding officer at the conference. He had enjoyed a great career in Congress, and had been the ablest Republican leader of his day. He was a truly great statesman and an able negotiator. In his address of welcome to the delegates, he laid down the main tenets of his Pan-American faith. As inhabitants of the New World, Blaine declared, we were controlled by like situations, in the wake of which came like sympathies and like duties. The basis of future relations should be equality, and of such a nature as to beget confidence, friendship, respect, and peace. On the positive side, he mentioned an enlarged intercourse, a mutual helpfulness, and a just reign and administration of law among and in the nations of America. Such benefits would flow from the Pan-American movement. On the other hand, it would serve to prevent standing armies, a balance of power, secret agreements and negotiations, conquest and territorial aggrandizement, alliances, and the use of force. So high did he place the ideal that the nations have not yet attained it.

The member states responded cordially, even enthusiastically, to the

challenge of Blaine. The agenda of the conference covered such subjects as measures designed to promote peace and prosperity; a customs union; communications; uniform customs regulations; uniform system of weights and measures; patents, copyrights, and trademarks; extradition; a common silver coin; and a plan of arbitration. New soil was being tilled, and the conference is not to be judged too much on the basis of tangible results. The passing of time was necessary to disclose what were the common interests, and what form they should take. The plan for arbitration is deserving of special attention, for in it the principles of a league of peace and of the outlawry of war are set forth as clearly as in any international document. As an instrument for the preservation of peace, it should belong to the ages. Arbitration as a means of settling international disputes, as between the republics of America, was recognized "as a principle of American international law." Compulsory arbitration was made to extend to diplomatic and consular privileges, boundaries, territories, indemnities, the right of navigation, and the validity, construction, and enforcement of treaties. It should also extend to all other cases of whatever origin, nature or object, except when in the judgment of one of the parties to the controversy this might imperil the country's independence. In this case arbitration was optional for the aggrieved state, but obligatory upon the adversary power. Arbitration was recommended to the states of Europe as a means for the settlement of international disputes. The treaty of arbitration, which was signed by eleven members of the conference, including the United States, provided that ratifications should be exchanged at Washington on or before May 1, 1891. No ratifications were filed at or before that time. The treaty had been rejected by some of the leading governments, and a proposal to extend the time for its going into effect did not meet with favor. It was also provided that title by conquest should have no further sanction under American public law. These provisions are, indeed, the necessary bases for any enduring peace, and might well commend themselves to the controlling authorities of other international organizations.

An International Bureau of American Republics was established in Washington. Its purpose was to collect and publish information having to do with the laws, products, and commerce of the Pan-American republics. The Secretary of State was made the administrative head. A budget of $36,000 was voted, with quotas assigned among the countries according to population. It became in time the Pan-American Union. The hope of Blaine was thus expressed: "We

look upon his new Magna Charta which suppresses war and substitutes arbitration among American governments in its place, as the first result and most important one of the International American Conference.''

The work of Blaine was not actively championed by an American President or Secretary of State until McKinley's administration. The Spanish-American War supervened, and as a result the next conference was delayed. In his annual message to Congress, in 1899, McKinley suggested the holding of the second conference. Mexico issued an invitation, which was accepted, and the delegates assembled in Mexico City on October 22, 1901. The sessions lasted until January 31, 1902. Arbitration was the leading topic of discussion. All states were represented, and all of them favored arbitration as a principle, but they differed widely as to the extent to which the principle should be carried. There were three views advocated at the conference: (1) obligatory arbitration, covering pending and future questions short of independence or national honor; (2) obligatory arbitration, covering future questions only, and expressly excepting certain classes of questions from arbitration; and (3) voluntary arbitration, as expressed by the Hague Convention, for the pacific settlement of international disputes. The United States urged adherence to the Hague Convention. At length, the United States and Mexico, then the only members of the Hague Court, were authorized to negotiate with the other member-powers with a view to the adhesion of the American states. A few of them signed a treaty of compulsory arbitration, while the United States, together with a majority of the states, signed a convention covering the arbitration of pecuniary claims. The nations agreed to submit to arbitration for a period of five years, preferably to the Permanent Court at The Hague, all claims for pecuniary loss or damage which might be presented by their respective citizens, and which could not be settled by diplomacy, when of enough consequence to justify the expense of arbitration. A resolution of the first conference relating to the construction of a Pan-American Railway was adopted. Closer commercial relations were an object of the conference's solicitude. The question of the suppression of epidemics in tropical countries was given attention.

The Third Pan-American Conference assembled at Rio de Janeiro on July 21, 1906, and adjourned on August 26 of the same year. It had in mind the Second Conference at The Hague. The American delegates to the latter conference should, according to one of the resolutions, attempt to secure a general treaty of arbitration which would

receive the merit of the civilized world, and which would be put in force by every nation. The conference failed to pass resolutions regarding the forcible collection of debts, as the members were chiefly debtor states. The Second Hague Conference was invited to consider the question of the compulsory collection of public debts, with a view to reducing inter-state conflicts having a pecuniary origin. Two international bureaus for the registration of copyrights, patents, and trade-marks were set up at Havana and Rio de Janeiro. It was agreed that naturalized citizens who returned to their country of origin with intent to remain, should acquire their original national character. The Bureau of American Republics was reorganized at this conference. The treaty covering pecuniary claims was renewed. Provision was made for an international commission of jurists which was to formulate codes of international law for the states of America. At this conference Secretary of State Root made the following celebrated statement: "We wish for no victories but those of peace; for no territory except our own; for no sovereignty except the sovereignty over ourselves."

The Fourth Pan-American Conference was held at Buenos Aires during July and August, 1910. The governing board of the Bureau of American Republics had prepared the way. There were fourteen committees, and each nation had membership in six of them. The agenda covered such subjects as the organization of the Pan-American Union; steamship service; the Pan-American railway; uniform consular documents and customs regulations; sanitation; copyrights, patents, and trade-marks; the arbitration of pecuniary claims; and the exchange of students and professors. The procedure of the conference was regulated to some extent. Subjects not on the agenda could not be introduced without the concurrence of two thirds of the members. States not maintaining diplomatic relations with the host could send delegates, and states not represented diplomatically at Washington could entrust their votes to other delegates. Membership was based on the existence of a strong government. The Bureau of American Republics was reorganized again, its functions were defined, and its name was changed to the Pan-American Union. The presidency of the governing board was entrusted to the American Secretary of State. The members were to be the states which maintained diplomatic representatives at Washington. The outlines of organization and procedure were made at this conference.

The Fifth Pan-American Conference, which met at Santiago, Chile, March 25–May 3, 1923, proved to be an interesting session on ac-

count of the introduction of new subjects. Some of the states wanted to continue the Pan-American Union in its present organization, and with its present functions. Others wanted a Pan-American union with "teeth" in it; they wanted an organization which would settle differences, and promote the social and political phases of coöperation, as well as the commercial. Eighteen subjects found a place on the agenda. Routine non-controversial questions, such as education, commerce, and hygiene, constituted one class of questions. The political questions embraced an American league of nations, the codification of international law, arbitration, the Pan-American Union, and common means of defense against exterior attack. Disarmament was fully discussed, but no decision concerning it was reached. The eight committees were: political, juridical, disarmament, commerce, communications, hygiene, agriculture, and education. An acceptable trade-mark convention was concluded. A full program for public health in America was mapped out. The question of communications, as modified by the airship and the radio, received special attention, and educational matters were enthusiastically considered. An attempt was made to make of the organization a real league of states of the Americas. This was due to the concept of an American international law, to the alleged control by the United States of the Pan-American Union, and to a natural hostility against the United States. Either a new organization should be formed, or the Union should be enlarged. The seat of the Union was Washington; membership in it was confined to representatives of the states having diplomatic relations with the United States; the head of the Union was the American Secretary of State, who outranked all of the other members. It was virtually made purely a North-American institution. At length it was agreed that any state not represented at Washington might maintain a special representative, and that the usual diplomatic representatives might continue to serve. Some of the delegates had proposed that the member states should be allowed to name any delegates they might see fit to send. Thus, membership does not depend on the recognition of a government by the United States.

An international court for the settlement of American questions was urged. It would not interfere with the function of the more inclusive courts, and would relieve them of the settlement of such questions. It would be a fitting complement, as the inter-American judiciary, to the legislative body, or the conferences, and to the executive body, or the Pan-American Union. A commission of jurists to codify international law was arranged for, to meet at Rio de Janeiro

in 1925. No agreement as to disarmament was reached, due to the attitude of the ABC powers, especially Chile. A treaty of peace was signed by sixteen of the states, extending to the continent the essential principles of the Bryan treaties of 1913 and 1914. All disputes which could not be settled diplomatically should be referred to a commission of inquiry, and during the period of investigation military forces were not to be mobilized.

Much anti-American sentiment was manifested at the Conference. There were several reasons for this. The American delegation declared the Monroe Doctrine to be unilateral, and thereby angered those who wanted to make it a continental matter. United States control and tutelage in the Pan-American movement was resented and feared. Some of the states resented our giving aid to Brazil, at her request, in the reorganization of her navy. This was done only after an earlier refusal, and after a reminder that Great Britain would be requested to send a naval mission. Other states had taken advantage of naval missions from non-American countries without comment or complaint. Many of the smaller states, smarting under the discipline of American tutelage, found a convenient and embarrassing way to strike back. Such states might take a leaf from their own book. Criticism of the United States has been a favorite indoor sport with them. Without the United States Pan-Americanism could not function, and without American support such states would lose their political independence. Much good was accomplished at the conference. If the adhesion of the United States is wanted, time will be saved in future conferences by the elimination of subjects to which it is known that the United States will not agree.

Pan-Americanism has assumed from time to time a more practical form. While the political questions which were raised at the Fifth Pan-American Conference in 1923 have complicated the work of the Pan-American Union, progress is steadily being made toward closer coöperation in non-political matters. A manifestation of this tendency is found in the Pan-American Financial Conference which met at Washington on May 24, 1915. The President of the United States had been authorized by the Congress to invite the countries of the Americas to a conference with the American Secretary of the Treasury in order to establish closer and more satisfactory financial relations. Eighteen governments accepted the invitation. The official delegates, the diplomatic corps of the countries represented, and a number of financial officials of the American Government, attended the conference. A number of readjustments were necessary, due to the

derangement of trade and finance by the World War. The conference, in a word, was seeking a way out. Committees were appointed to consider seven subjects: (1) the establishment of a gold standard of value; (2) bills of exchange, commercial paper, and bills of lading; (3) uniformity in the classification of merchandise, customs regulations, consular certificates, invoices, and port charges; (4) uniform regulations for commercial travelers; (5) international agreement respecting trade-marks, patents, and copyrights; (6) uniformity in postage, money orders, and parcel post charges; and (7) extension of arbitration by various commercial agencies to private commercial controversies. The permanent agent of the conference was to be the International High Commission, to which the minister of finance of each country was authorized to appoint as many as nine members. This organization was definitely sanctioned by act of Congress on February 7, 1916. The commission has assumed the form of an administrative body which carries on the work of the financial conference until a new one is held. It meets from time to time and discusses commercial projects, some of which were not included in the agenda of the financial conference. At the first meeting at Buenos Aires, in 1916, there was established a central executive council for the purpose of facilitating and centralizing the work of the International High Commission. There was thus set up a special machinery for the determination of Pan-American financial questions. It illustrates a tendency on the part of interested groups to hold conferences of their own instead of merging their interests in the more general Pan-American conferences.

Pan-American scientific interests have found expression in the Pan-American Scientific Congresses, the first of which was held in Santiago, Chile, from December, 1907, to January, 1908, and the second in Washington from December, 1915, to January, 1916. At the latter conference Secretary of State Lansing set forth what he believed to be the essential qualities of the Pan-American family. He pointed out that the Monroe Doctrine and Pan-Americanism did not necessarily conflict, and that the deliberations of the conference in keeping with the spirit of Pan-Americanism should be guided by sympathy, thoughtfulness, and a sincere desire for helpful coöperation. In addition, he pointed out that Pan-Americanism transcended politics, and found its application in the varied fields of human enterprise. One of these important fields was science. The conference gave itself over to a study of scientific questions, and more attention was paid to the public phases of scientific investigations and endeavors. Such subjects as irrigation,

education, agriculture, mining, public law, public health, transportation, commerce, and finance were discussed. Such conferences, based upon a circumspect and well-defined community of interest, will constitute important landmarks in the onward march of Pan-Americanism.

The Proposed Pan-American Pact.—There is disclosed in Seymour's *Intimate Papers of Colonel House* the effort of Colonel House to carry on the work which Blaine so effectively started. The Colonel was of the opinion that the World War resulted from the lack of organized international coöperation, and he therefore desired that President Wilson should develop a positive and permanent Pan-American policy based upon the principle of conferences and cooperation. At various times he urged the President to pay less attention to domestic policy and more attention to a welding together of the continents of the New World. The mediation of the ABC powers at Niagara in regard to the Mexican question, seemed an auspicious starting-point for such a program. On December 16, 1914, Colonel House explained to President Wilson that his disappointment in being unable to influence the course of the European nations might be compensated by his welding the western hemisphere together. House declared that his idea was "to formulate a plan to be agreed upon by the republics of the two continents which in itself would serve as a model for the European nations when peace is at last brought about." In addition, he urged that the republics of the two continents should agree to guarantee one another territorial integrity, and that they should agree to government ownership of munitions of war. The President seemed pleased with these suggestions and wrote a brief draft of them. On the next day, at the President's suggestion, Colonel House interviewed Mr. Bryan, who was then Secretary of State. Bryan acquiesced in the general plan, but seemed to have little interest in international peace other than his "cooling-off" treaties. He therefore gave little help or encouragement to the general plan. Colonel House now determined to interview the ambassadors of the ABC powers. On December 19 he saw the Argentine ambassador, Señor Naon, who seemed gratified with the President's draft and assured Colonel House that the Argentine government might be expected to give its enthusiastic approval. In the afternoon of the same day Colonel House interviewed Da Gama and Saurez, respectively Brazilian and Chilean ambassadors to the United States. Da Gama was easily convinced. Saurez hesitated, on account of the boundary dispute between Chile and Peru. Both agreed to cable their governments.

On December 24 Da Gama informed Colonel House that the President's proposition for a project of convention seemed agreeable to his government. On December 29 Ambassador Naon handed to Colonel House a dispatch from the Argentine government which read as follows: "The government receives with sympathy the proposition with the understanding that such a proposition tends to transform the one-sided character of the Monroe Doctrine into a common policy of all the American continents." President Wilson and Colonel House discussed the advisability of laying the matter before the Senate Committee on Foreign Relations. They agreed with Ambassador Naon that there should be a single convention, rather than twenty-one different treaties on the same subject. The Chilean Ambassador received a tardy response from his government. On January 19, 1915, he informed Colonel House that his government accepted the plan in principle and praised the idea as a generous and Pan-American one. He pointed out that it would be difficult to find proper expressions to make the idea agreeable to the several parties, but expressed the hope that this could be done when the agreement was discussed. Colonel House was not satisfied with this ambiguous reply, but he did not allow it to discourage him. From January to June of 1915 he was in Europe and was occupied chiefly with European problems. While his interest in the Pan-American project did not cease, he was not on the ground to give the negotiations his personal attention. Upon his return he found that no progress had been made. This he deemed to be accounted for by the delays of the Chilean Government and by the lukewarm attitude of Mr. Bryan. Chile seemed unwilling to bind herself to a non-aggressive policy.

In July, 1915, Mr. Lansing became Secretary of State. He first heard of the Pan-American project from Colonel House. American relations with Mexico complicated the negotiation of such a pact. With a view to securing Chilean agreement, the proposed Pan-American accord was revised. In the revised pact the clause providing for the abolition of the private manufacture of arms was eliminated, and it was merely provided that an automatic embargo on ammunition should be put into effect in case of a revolutionary attack upon an existing government. In case disputes should arise, they were to be submitted to investigation and arbitration. Territorial integrity and political independence under republican forms of government were still the basic guarantees. The Brazilian and Argentine ambassadors gave their cordial support to the revised draft. The Chilean Ambassador expressed his personal approval of the plan, but

had no definite authorization from his government. On January 6, 1916, President Wilson, in his address to the Pan-American Scientific Congress, gave the main points of the proposals to the public. He declared that the United States wanted to remove the feeling that the Monroe Doctrine, really an inhibition on European governments, implied the establishment of protectorates in the Latin-American countries. He pointed out that certain interchanges of views had already taken place between the interested powers, and at the same time observed that the orderly process used to settle disputes within our own boundaries should be extended to our inter-state controversies. Colonel House soon left for Europe, where he remained until March, 1916. While there, he interviewed the Chilean minister to Great Britain, who observed that Chile, while pleased with the pact, had great fear of Japan. He believed that Chile would be one of the leading copper-producing countries of the world, and that she would be of great importance to the United States because of her coastline and because of her nitrate and copper deposits. Colonel House took steps to secure British approval of the Pan-American pact. He therefore suggested to Sir Edward Grey that a member of the House of Commons should ask him if his government had knowledge of the pact. Sir Edward in reply should express his knowledge and approval of the entire undertaking. This, Sir Edward at first agreed to do, but in a conference of his colleagues it was decided that such a step would be unwise. The Chilean ambassador at Washington did not secure the support of his government and the enthusiasm of Brazil soon cooled. The Mexican situation again became complicated and further agitation was fruitless. The United States became increasingly involved, first in the neutrality controversy with European nations, and second in the issues of the Great War. Colonel House likewise became engulfed in them. Thus one of the most unselfish and commendable efforts toward effective Pan-American accord came to an end. The revised draft reads as follows:

Article I.

That the high contracting parties to this solemn covenant and agreement hereby join one another in a common and mutual guaranty of territorial integrity and of political independence under republican forms of government.

Article II.

To give definitive application to the guaranty set forth in Article I, the high contracting parties severally covenant to endeavor forthwith to reach

a settlement of all disputes as to boundaries or territory now pending between them by amicable agreement or by means of international arbitration.

Article III.

That the high contracting parties further agree, First, that all questions, of whatever character, arising between any two or more of them which cannot be settled by the ordinary means of diplomatic correspondence shall, before any declaration of war or beginning of hostilities, be first submitted to a permanent international commission for investigation, one year being allowed for such investigation; and, Second, that if the dispute is not settled by investigation, to submit the same to arbitration, provided the question in dispute does not affect the honor, independence, or vital interests of the nations concerned or the interests of third parties.

Article IV.

To the end that domestic tranquillity may prevail within their territories, the high contracting parties further severally covenant and agree that they will not permit the departure from their respective jurisdictions of any military or naval expedition hostile to the established government of any of the high contracting parties, and that they will prevent the exportation from the respective jurisdictions of arms, ammunition, or other munitions of war destined to or for the use of any person or government of any of the high contracting parties.

November, 1915.

Central-American Concord.—A significant phase of Pan-Americanism is the interest of the United States in the states of Central America. Whether rightly or wrongly, we have always regarded this region as under our special protection and of special interest to us. In 1823 a constituent assembly declared this region to be free of Spain, and organized as the United Provinces of Central America. The United States recognized the new government in 1825, and a treaty of amity and commerce was negotiated in 1826. In 1840 the President was expelled and the federation was dissolved. In 1841 W. S. Murphy was sent to negotiate with any sovereign power, but he found no state having a sovereign status. In 1842 Salvador, Nicaragua, and Honduras entered into a confederation for a period of two years. In 1849 another experiment failed. Guatemalan independence was declared in 1847. Elijah Hise, sent to negotiate with Guatemala and Salvador, made treaties with most of the Central American states in order to protect the United States against British ambitions in Central Amer-

ica. His treaty with Nicaragua gave to the United States in perpetuity a land and water route through Nicaragua for a canal, in return for an American guarantee of Nicaragua's sovereignty. He was recalled before his report was received. E. G. Squier was sent to treat with all the states separately. He was instructed to obtain from Nicaragua a route of free transit for American citizens over any canal or railway, but he was not to stipulate a guarantee of independence or sovereignty. He secured a treaty from Nicaragua which guaranteed the canal route. In the course of his negotiations he encouraged the union between Honduras, Salvador, and Nicaragua.

Cordial relations between the United States and the Central American countries were strained through the expeditions of William Walker, the chief of American filibusters. He, at length, secured control of the government of Nicaragua, which in time was recognized by the United States. The Central-American republics finally combined in an alliance to terminate the Walker régime. His second filibustering expedition was captured by the United States, and his third and last attempt resulted in his being captured by the British, who turned him over to Honduras. He was executed by a firing squad. These expeditions were violations of American neutrality and stood in the way of the organic union of Central-American states, a union which the United States sought diligently to promote.

After the first failure of the confederation in 1840, further efforts were made in 1842, 1849, and 1852, none of them successful. In 1872 a convention of union was signed by all the states except Nicaragua. This movement had the support of Secretary of State Hamilton Fish. In a short time Salvador and Honduras were at war. Mr. Williamson, American minister to Guatemala, declared in a letter to the Department of State in 1874 that the former debts of the Central American states, their local prejudices, their lack of common interests, the bad communications and the paucity of leadership were obstacles to union. In 1876 President Barrios of Guatemala suggested the annexation of the other four states to his country, but this proposal failed to receive the encouragement of the remaining states. Secretary of State Blaine, thinking that the union would be a step in the direction of a broader and better Pan-Americanism, strongly urged the union in 1881. During the next year, Barrios paid a visit to the United States and was encouraged in his efforts toward union. He declared upon his return that his efforts were unselfish and that he would not be a candidate for the presidency. In 1885, contrary to his promise, he declared himself the military head of the Central-

American Union, and by decree formed all five states into a single republic. The other states appealed for protection to the United States, which offered its good offices to terminate the controversy. Barrios was killed and the treaty of 1885, signed by Guatemala, Nicaragua, and Honduras, ended the war. In 1887 a treaty was signed by all the states setting forth the principles on which union might be effected. Nicaragua refused to ratify the treaty. The United States took pains to point out to Guatemala that, while union was desired for its own sake, this government was opposed to coercion.

For a time the interest in the idea of the Central-American union seemed to flag. In 1895 Nicaragua, Honduras, and Salvador entered into a union for the exercise of external sovereignty. This union set up a federal diet composed of representatives from each state, to serve for three years. The other states were invited to join. President Cleveland recognized this union. In 1898, again, Nicaragua, Honduras, and Salvador established a federal republic, but it was soon dissolved.

The next series of events involving American action in Central America occurred in the wars of 1906 and 1907. In 1906 Guatemala was at war with Salvador and Honduras. American mediation was proffered, but to no avail. President Roosevelt and President Diaz intervened in the conflict and urged that the contending states cease hostilities, and that the U.S.S. *Marblehead* be accepted as a place for the peace preliminaries. The plan was accepted, and an agreement was signed arranging for a peace conference in Costa Rica, with the United States and Mexico represented as arbitrators. All states except Nicaragua sent representatives. A treaty of amity and commerce was signed, and the International Central-American Bureau was established at Guatemala City, while the Central-American pedagogical institution was located at San José, Costa Rica. Nicaragua was opposed to the mediation of the United States and refused to sign the peace.

A new conflict broke out in 1907 between Honduras and Nicaragua. The United States and Mexico offered their mediation, which again was effective. Salvador joined Nicaragua, and a general Central-American war was imminent. Peace was finally declared and President Roosevelt called the Central-American states into conference at Washington to consider and adjust all differences. His mediation was accepted, and the conference assembled in Washington in November, 1907. Mexico and the United States were represented. Secretary of State Root welcomed the delegates in behalf of the President of the United States. The inevitable plan of union was again put forward by

Honduras. Nicaragua and Guatemala supported it, but the other states opposed it. A deadlock ensued, to be broken only by postponement of consideration of the plan of union.

Several important steps were taken at this conference. A treaty of peace was concluded, to run for ten years. Any measure designed to alter the constitutional organization of one state was to be dealt with as a menace to all. Political refugees were to be kept from the borders of the Central-American states. Honduras was neutralized insofar as conflicts between the other states were concerned. The Central American Court of Justice was established, consisting of five judges, one for each state, to serve for five-year terms. The jurisdiction was obligatory in cases involving two or more states, and majority decisions of the court were to be final. The court was authorized to fix a *status quo* pending the handing down of a decision, and during this time the states were bound to carry out the orders of the court. Agreements were signed with respect to the Central-American Bureau, the subject of extradition, railway communications, and the holding of future Central-American conferences.

The Central-American International Bureau was organized the next year at Guatemala City. It was to be composed of one representative from each republic, and its organ of opinion was to be the *Centro-America*. Its functions relate to the reorganization of the bureau itself, the encouragement of modern educational systems, the promotion of foreign and domestic trade, the reform of legal institutions, the development of industries and agriculture, and the reform of customs, credit, weights and measures, and other routine commercial matters.

Central-American unification has been to some extent adversely influenced by the special position of the United States in Nicaragua. President Zelaya of that republic ordered the execution of Groce and Canon, two Americans serving in the revolutionary army. Diplomatic relations were broken off by the United States, and Secretary Knox declared that Zelaya had not only been a center and source of trouble in Central America, but had violated the Washington conventions of 1907. Upon the resignation of Zelaya, the revolutionist, Estrada, gained control of the government and was recognized by the United States. Mr. T. C. Dawson negotiated a treaty for the United States providing for a protectorate and a loan, but the Senate failed to ratify it. A loan, however, was negotiated. An American was put in charge of the collection of customs, and a claims commission succeeded in adjusting a number of the foreign claims against Nicaragua.

In 1911 the Nicaraguan government appealed to the United States for aid, and in 1912 American marines were landed. Secretary of State Bryan under the Bryan-Chamarro Treaty of 1916, continued the negotiations begun by Mr. Knox. The United States was given an exclusive right-of-way for the construction of a canal along any Nicaraguan route. The Great and Little Corn Islands were leased to the United States for ninety-nine years, and the right was secured to establish a naval base on the Bay of Fonseca, with the privilege of renewal. The United States agreed to pay three million dollars in gold to Nicaragua. The Senate ratified the treaty with the reservation that nothing in the treaty was understood to be prejudicial to the interests of Honduras, Salvador, and Nicaragua. The Bryan-Chamarro Treaty was brought before the Central-American Court of Justice. The other Central-American states claimed certain rights on the Bay of Fonseca, and also certain rights in a canal route. These rights, they held, could not be disposed of without their consent. The court decided against Nicaragua, but admitted its lack of jurisdiction in the case. Nicaragua took the view that its treaty was with the United States and not with the countries of Central America. The court formally dissolved in March, 1918.

Not discouraged by repeated failures at constitutional organization, in 1921 Guatemala, Honduras, Salvador, and Costa Rica signed a constitution. Nicaragua refused to join on account of her relations with the United States under the Bryan-Chamarro Treaty. This union also came to grief.

Secretary of State Hughes, desiring to establish better understanding and closer coöperation, and to remedy the apparent and proved defects of the Washington conventions of 1907, invited the Central-American states to participate in a second conference. The reëstablishment of the court was one objective for the conference. A desire was expressed to avoid the heavy burden of military expenditures which some of the republics had to carry on account of the activities of political exiles who, having left their country of origin to seek refuge in adjoining republics, often used their country of adoption as a base of operations against the constituted authorities of their country of origin.

All of the states of Central America sent delegates to the conference. The United States was represented by Charles E. Hughes, Secretary of State, and the Hon. Sumner Welles. Secretary Hughes, in his address to the delegates, denied any intent on the part of the United States to interfere with Central America, except in the interest of

peace, security, and stability. Our motive and hope was to aid them in achieving an abiding peace and a constantly increasing prosperity. Honduras again urged the plan of union. It was voted to study systems of federation through the establishment of a Central-American Commission. A conference was to meet in 1926 and a convention was to draw up a constitution. Thus the constitutional question was postponed. The conference then gave itself to a careful study of its problems. There were finally adopted twelve treaties and conventions, and three protocols. The general treaty of peace and amity described as a menace to peace, any effort to alter the constitutional organization of any nation, whether proceeding from a public power or from private citizens. No government, therefore, would be recognized which should come into power through a *coup d'état* or revolution so long as the constituted representatives had not altered constitutional arrangements. The United States has championed this principle in some of its representations to the Central-American countries. The convention for the establishment of an international Central-American tribunal reëstablished the court of 1907. Under this convention the parties agreed to submit to the tribunal all controversies or questions which then existed or might arise between them in case they could not be settled through diplomatic channels or through some form of arbitration. The jurisdiction, personnel, organization, and procedure of the court were explicitly set forth. A third convention provided for the establishment of international commissions of inquiry. The remaining treaties dealt with the following subjects: the establishment of free trade, the uniformity of protective laws for workmen and laborers, the practice of the liberal professions, the preparation of projects of electoral legislation, the establishment of stations for agricultural experiments and animal industries, the reciprocal exchange of Central-American students, extradition, the establishment of permanent Central-American commissions, and the limitation of armaments. The three protocols included an agreement between the Central-American states and the United States, whereby the latter could designate some of its citizens to serve on the international tribunal in conformity with the treaty of establishment; a declaration that the Spanish text is the only authoritative one; and a protocol to the convention which established the international tribunal. The convention on the limitation of armaments is significant in view of the fact that land armament is included in the principle of limitation.

The time is not ripe for a constitutional organization having the effect of a Central-American union. The diversities of the peoples and

of the region seem to forbid it. Certainly one of the efforts put forward would have succeeded if the elements of success had existed. For the time being the conventions which have been negotiated will serve as a unifying process in bringing together the institutions and the public interests of the Central American republics. This can be done only through conferences and coöperation. Consolidation and cooperation as regards institutions of government, law, society, education, and public welfare, may have the advantage of a federal republic without some of the apparent disadvantages. It is, at best, a step forward in the progress of Pan-Americanism and for the time being sets at rest the question of peace, order, and prosperity in an important region of the western hemisphere.

Recent events have put our Central-American policy to a severe test. In 1924, the United States and other governments recognized the coalition government of President Solorzano and Vice-President Sacasa. Emiliano Chamarro, the defeated candidate, after the withdrawal of the American marines, forced the resignation of the president and the retirement of the vice-president from the country, and had himself appointed Designate by the assembly. Recognition was refused his government as in violation of the provisions of the Washington conventions. The liberals, led by Solorzano, also started a revolutionary movement. American forces were again landed, and mediation between the parties led to no result. Chamarro turned the office over to Uriza, but recognition was denied for the same reason. The assembly was called, and Adolpho Diaz was designated as President. He was recognized by the United States. Dr. Sacasa, the vice-president, returned to Nicaragua and set up a government. He claimed the succession on the constitutional ground as being next in line, and due to the claim that the Diaz government was based on a *coup d'état,* and therefore illegal. Diaz asserted his régime to be constitutional, on the ground that, under the Constitution, the assembly may, during the absence of a president and vice-president, designate an executive. Diaz charged that Mexico was supporting the claims of Sacasa through an effort to obtain a Bolshevist foothold in the country. These statements were supported by the American Department of State.

President Coolidge, in a message to the Congress, January 10, 1927, set forth the policy of the American government. The United States must concern itself with any threat to the stability and constitutional government in Nicaragua which might lead to anarchy and to the jeopardy of American interests, especially when contributed to or

brought about by outside influence or by any foreign power. He had, he declared, "conclusive evidence" that large quantities of munitions and arms had been shipped to the Nicaraguan revolutionists; that the carrying boats had been fitted out in Mexican ports; and that these measures had been taken with the knowledge, and in some cases, with the encouragement of Mexican officials. Mexico replied that she had no such interest in Nicaragua as the President had alleged, and pointed out that her recognition of the Sacasa government was in keeping with the Washington conventions of 1923. Both Diaz and Sacasa have made overtures with a view to settling their difficulties through the inevitable compromise of rival factions.

Perhaps no course of the United States has been so severely criticised as its Nicaraguan policy. The press of Europe, chronically hostile, pointed to it as an example of American imperialism. The literary opposition of Latin America to all things American flared into a blaze. In the United States, the administration was embarrassed from the first in the settlement of this question. Senator Wheeler introduced a resolution in the Senate demanding the withdrawal of the marines as unjustified, and as violative of international law. The opposition of Senator Borah brought Secretary Kellogg before the Foreign Relations committee of the Senate, in an effort to defend his policy. He declared that the Calles government was doing what it could to make Nicaragua the base of a Bolshevist régime against the United States. He cited the aims of certain Communist organizations which sought to alienate Latin-American opinion against the United States. The Mexican foreign minister, Aaron Saenz, replied that Mexico was not in this plan mentioned by the Secretary of State, and also that the Soviet Minister to Mexico had been warned not to affiliate with the radical groups in Mexico. Mexican labor leaders denied that they had been influenced from Moscow. Mr. Borah then led a bitter attack against the Department of State, criticising the recognition of Diaz, declaring that Sacasa was the constitutional President, and that the landing of marines was a part of an "unconscionable" policy. Additional resolutions were introduced in the Senate and the House of Representatives, seeking to limit the discretion of the President in the use of the armed forces of the country. Memorials from organizations, college professors, and individuals poured in, protesting against intervention, urging arbitration of outstanding difficulties with Mexico, and in one case demanding the withdrawal of national protection from all persons engaging in business in foreign countries.

The Department of State could not remain uninfluenced by these representations. It illustrates in a striking way how organized public opinion can influence foreign policy. It is to be regretted that the views of the less articulate organizations and interests were not stated. Persons and organizations in the business of fighting so-called imperialism and in promoting peace get the larger share of publicity, and consequently receive a larger consideration than is their due, on account of their organized channels of pressure. It is their business to make war appear probable, or to make something appear imperialistic, or their business would suffer. Such pressure, where given attention, should be made responsible, and its source clearly indicated. The representations of these organizations, and of certain members of the Congress have been based on certain misconceptions. In the first place, at no time did the United States contemplate hostile measures against Nicaragua, or any faction there. A method of control which has developed through two decades was applied to meet one of a chain of circumstances. Moreover, the United States has not desired to support any faction *per se,* but to throw its support to any régime which would result in the restoration of order and the resumption of government. The charge that the Washington conventions were violated by the United States is baseless. It twice refused to recognize governments (Chamarro and Uriza) because they were clearly in violation of the Washington conventions. When Diaz was elected by the assembly, the vice-president was out of the country, and there was no government but the one at hand. It was at least an expression of the will of the assembly, with the influence of Chamarro removed, although his shadow remained. Recognition and support of the act of the constituted authorities seemed to the American government in keeping with the Washington conventions. It was hardly within the power of the government, or within its right, to keep a situation static until Sacasa could return and take control. The decision of the American government was no judgment against Sacasa. He was removed from the situation so as not at the time to be a factor. It only took account of facts as they were. Where rival constitutional claims are made, it is the right of the government and its responsibility to make a choice, and time may not admit of their being made in keeping with irresponsible and abstract notions of what some deem to absolute justice. The American intervention in Nicaragua is against a situation, not a government or a faction.

It is of course regarded as imperialism to prevent measures which will endanger our canal rights in Nicaragua. Instability would inter-

fere with them. They are guaranteed by treaty. Should the canal be built, it will be American money and men which do so, and American enterprise which will protect it and maintain it as a new waterway for the use of the world. Such rights any government would protect. The right to protect American lives and property is a fundamental one. No amount of agitation by irresponsible parties for the abandonment of this right can alter the situation. The man whose life and property are affected has a different point of view. Then the United States has a special position in Central America. European nations look to us for the protection of their interests. It is the "American Balkans." The conflagrations there have been kept in bounds, mainly by the mediation and intervention of the United States. It has been in the main a process of peace and order, and has not involved the world as has the European Balkans. It is a standing rebuke to European critics of American policy in Latin America. If the objects and purposes of European imperialism had been the same as the so-called "American imperialism," there would have been less war in Europe. Latin-American opposition has arisen. It is chiefly literary and is not altogether responsible. There is a widespread feeling of appreciation for American policy which does not find its place in public print. Finally, we have the severe American critics, who make it difficult for the country to appear to stand united on any issue of foreign policy. There are three classes of persons so far as foreign policy is concerned. One class gives its enthusiastic support to any measure of the government, and assumes that the position is correct, because it is the position of the government. In a democracy criticism is needed, and foreign policies, in their nature mutable, need criticism. Then there is the class which assumes that the government is wrong in any foreign issue to which it is a party, because it is the government. This is the most articulate class, and the most irresponsible. Finally, one class gives the government the benefit of the doubt provisionally, and looks into the merits of the issue with an open mind, not hesitating to commend or criticise according to their convictions. The majority of the American people are made up of the latter group. They neither rush into wars nor follow a policy of inaction when ruin would result.

Our policy with Central-American states has not always been just. We have been guilty of abuses, and have suffered from them. But it has not always been wrong, and has been directed toward the perpetuation of the independence and of the integrity of these states. Measures of control have been exercised under conventional relations.

But the record speaks as to whether it is imperialism or benevolent diplomacy.

III. *De Facto* Recognition

Recognition during the Revolution.—By resolution of Congress of November 29, 1775, a Committee of Five was appointed for the purpose of corresponding with American friends in Great Britain, Ireland, and other parts of the world. This committee was instructed to lay its correspondence before the Congress when so directed. The Congress agreed to defray all expenses incident to the carrying on of such correspondence, and to the payment of agents employed in this service. The Congress, essentially a revolutionary body, determined to establish diplomatic relations with European governments. Ministers were sent to European courts without previous inquiry as to whether they would be received. The object of these missions was to borrow money and to obtain recognition. Benjamin Franklin regarded them as indiscreet. In a letter to Arthur Lee, dated March 21, 1777, he expressed his judgment of the extreme enthusiasm of Congress in hastening foreign intercourse: "I have never yet changed the opinion I gave in Congress, that a virgin state should preserve the virgin character and not go about suitoring for alliances, but await with decent dignity the application of others. I was overruled; perhaps for the best."

The quest of recognition in some of the European countries resulted unfavorably for the revolted colonies. Ignoring the advice of Franklin, Congress commissioned William Lee to Vienna; Dana to St. Petersburg; Adams to The Hague; Izard to Florence and Arthur Lee to Madrid. All of these representatives were instructed to secure both recognition and subsidy; none were officially received. The prestige of the United States was wounded, both by the practice of sending unwelcome representatives and by the manner of the appeals. Congress did not seem to take into account the likelihood that the recognition of the United States by neutral powers would be considered by Great Britain an act of intervention.

Russia was at that time championing neutral rights and hence could not afford to abandon her neutral position. Frederick the Great of Prussia was not opposed to the American revolt, but neutral interests prevented him from according recognition. Spain did not care to risk the consequences of recognizing the independence of the United States. The Netherlands had no inclination to become involved in the

American war until complications with England made it imperative. The alliance with France was the only one secured during the Revolution, and it proved of inestimable value in winning the war for independence. Our later connections with it, however, were not so fortunate.

Frankin, encouraged by the representatives from the French court, favored seeking an alliance with France, but with no other power. French sympathy with the Revolution antedated the revolutionary movement itself. The Seven Years' War and the Treaty of Paris of 1763 had reduced France to the rank of an ordinary power. She had lost her position in the New World, her navy was destroyed, her army defeated, and her commerce badly crippled. She sought to repair her fortunes and to regain her former prestige. If an alliance with the revolted colonies of America would produce this result, she would not hesitate to enter into negotiations. Louis XV encouraged discontent in the British colonies. Vergennes, foreign minister under Louis XVI, was not sentimentally interested in the Revolution, but he watched the American situation carefully with the idea of French intervention in mind. His agents refused to commit France to a policy of recognition, alliance, or active intervention.

The Congress made a draft of a treaty of commerce and alliance between the United States and France, and on October 2, 1776, submitted it to the Committee on Secret Correspondence. Benjamin Franklin, Thomas Jefferson, and Silas Deane were commissioned to negotiate the treaty. Any member of the commission was empowered to act in case of the absence or disability of the others. Jefferson declined to serve, and Arthur Lee, then at London, was substituted for him. Silas Deane had preceded the other commissioners to France, and had undertaken the negotiations in advance of Franklin's arrival. Some of his unwise negotiations led to his recall on December 8, 1777. To his credit, however, it should be said that he opened the way for Franklin and that he did secure material aid from unofficial French sources for the American revolutionary movement. Congress and the Secret Committee urged an early conclusion of a treaty of alliance. The American commissioners were reminded that all accommodation with Great Britain save on principles of peace and in a manner quite consistent with the treaties the Commissioners might make with foreign states, were totally at an end since the Declaration of Independence and the embassy to the Court of France. The commissioners, anxious to make every reasonable concession which would have the effect of hastening the alliance, agreed that the United States

would not enter into a separate treaty with Great Britain in case France or Spain should enter into a treaty with the United States of America, and in consequence enter into a war with Great Britain. This pledge, coupled with the publication of the Articles of Confederation and the various state constitutions, plus the defeat of General Burgoyne, convinced France that the movement in America was a formidable one which, if aided, would help to achieve the purposes of French diplomacy. Vergennes, accordingly, granted an audience on December 12, 1777. This led to a series of negotiations and to the conclusion of treaties of amity and commerce, and of alliance, at Paris on February 6, 1778. The Treaty of Amity and Commerce followed the Congressional plan, which is today the model for most of our commercial treaties. A Treaty of Alliance definitely provided for the military intervention of France in behalf of American political and commercial independence. Consistently with previous pledges of the American commissioners, each of the contracting parties agreed not to conclude a truce or peace without the consent of the others, and not to lay down arms until American independence had been guaranteed by treaties. Thus the recognition of France was accorded, but at the price of war with England, which regarded the Treaty of Alliance as a premature recognition of the independence of her colonies.

The negotiations leading to the treaty of peace between England and America involved some consideration of the recognition question. Fortunately for the United States, these negotiations on the American side devolved upon Benjamin Franklin. The growing unpopularity, in England, of the War for American Independence in due course of time affected the opinion of the parliament. The North ministry, threatened on several occasions with a vote of lack of confidence, resigned on March 20, 1782. Lord Shelburne advised King George III that a ministry could be formed only with Lord Rockingham as Prime Minister and with the understanding that the independence of the United States should be recognized. The ministry was therefore constituted with Rockingham as Prime Minister, Charles James Fox as Secretary of State for Foreign Affairs, and Shelburne as Secretary of State for Home and Colonial Affairs. Shelburne and Franklin had conducted some correspondence relating to the possibility of peace. This was a renewal of an old friendship of men holding the same economic and philosophical views. Shelburne represented, in spite of his political associations, the economic school founded by Adam Smith. A contest ensued between Fox and Shelburne as to which de-

partment should conduct the negotiations with Franklin. Fox took the position that negotiations belonged to the foreign office, because a war was being terminated and a new state was being recognized; Shelburne held that the colonial office should conduct the negotiations, because the colonies were not in a constitutional relation to Great Britain, and would not be until independence was definitely recognized.

But the contest was not merely over which was the appropriate department to conduct negotiations; it was much deeper than that. Franklin and Shelburne took the position that the Treaty of Peace was to be, in reality, a partition of an empire. The result would, in their mind, be essentially a physical separation of territory, and the people and governments of the separate political entities would succeed to all of their ancient rights and privileges. On this theory, the American citizens would retain their former rights as British subjects. Fox took an opposite view. He favored the recognition of American independence because of the unpopularity and the inutility of the war. He did not regard the peace as a partition of empire, but rather looked upon it as a concession of independence with such restrictions and penalties as Great Britain might be able to exact by reason of her commercial position. Fox said, in effect, to the colonies: "Go off by yourselves and enjoy your independence. Such commercial rights and privileges as are within our power to give, you will purchase dearly." It was therefore, according to this position, not a partition of empire, plus a retention of former rights, but an absolute separation, physical and political, of the two peoples and countries, coupled with a divesting of all rights which belonged to the American citizens in their prior capacity as British subjects.

Fortunately for the United States the negotiations fell into the hands of Franklin and Shelburne. Richard Oswald had been commended to Franklin by Shelburne as a man holding the same economic views as themselves, and fully apprised of Shelburne's mind. Oswald was acquainted with the American situation by reason of business and family interests on this side of the Atlantic. In due course of time the Rockingham ministry fell from power and to Lord Shelburne was entrusted the forming of a new cabinet. Thereafter the negotiations were completely in the hands of Shelburne, with Richard Oswald as his negotiator. Adams, Jay, and Laurens were associated with Franklin in negotiating peace for the United States. Franklin submitted to Oswald the propositions which he thought should prevail in the treaty of peace. Three were regarded as neces-

sary: (1) the recognition of American independence, (2) the settlement of boundaries, and (3) the freedom of fishing. Two were regarded as advisable: (1) free commercial intercourse, and (2) the cession of Canada to the United States as an adjustment of war claims and as a means of compensating Loyalists whose property had been confiscated. At the time when John Adams joined the negotiators, questions of independence, boundary settlements, the extent of Canadian territory, and the freedom of fishing had been conceded by Great Britain. The right to dry fish on British coasts, the compensation of the Loyalists, and the payment of debts due British subjects before the war were still under discussion. Franklin constantly urged the cession of Canada whenever British claims were pressed. Adams insisted that the treaty provide for the right of British creditors to sue for the recovery of their debts. The right to dry fish on British coasts was also granted, due to the insistence of Adams. The peace was signed on November 30, 1782. Lord North and Charles James Fox conspired to bring about the downfall of Shelburne. So vicious a combination is difficult to understand. Seizing upon the preliminary articles of peace as a campaign issue, they forced Shelburne's retirement. The new minister was in the end compelled to sign a definitive treaty of peace incorporating, in the main, the terms of the provisional treaty.

The question of recognition was brought up continually by the American negotiators. John Jay was distrustful of Oswald and objected to his commission, which was addressed to the British "colonies or plantations." Jay asserted that the United States should be recognized as a free and independent nation and that negotiations should not proceed unless Great Britain had this in mind. Franklin urged that the technicalities of the situation were relatively unimportant, inasmuch as Great Britain was negotiating a treaty with the colonies, the principle of which was to end a successful war on the part of the United States, and to make peace. What greater evidences of an acknowledgment of independence would one want? Jay was adamant, and demanded an acknowledgment of independence as a condition precedent to negotiations. Consequently, Oswald's commission was returned to the British government and was amended by it to read "The United States of North America" instead of "colonies or plantations."

Recognition during the French Revolution.—In 1789 the French Revolution broke out, and the change wrought by it in the government of France raised serious questions concerning our foreign rela-

tions. As the movement progressed, we were required to define our relations to it. Such definition resulted in the basic foreign policies of the United States which have been observed from that day to this. The people of the United States were moved by a profound sympathy with the ideals of the French Revolution. Many of them—perhaps a decided minority—would have forsaken our neutral position and entered the war on the side of France. For the most part, the official government view was opposed to an un-neutral policy. In 1792 Gouverneur Morris, American minister at Paris, informed the American Government that another revolution had been effected at that capital, and that it had been a bloody one. The king had been deposed on August 10 of that year. Morris asked for instructions as to his conduct under the circumstances about to arise, declaring that the present executive had just been born and might be stifled in the cradle. He found himself "in a state of contingent responsibility of the most delicate kind." On November 7, 1792, the Secretary of State made the following reply: "It accords with our principles to acknowledge any government to be rightful which is formed by the will of the nation, substantially declared. The late government was of this kind, and was accordingly acknowledged by all the branches of ours; so any alteration of it which shall be made by the will of the nation, substantially declared, will doubtless be acknowledged in like manner. With such a government every kind of business may be done. But there are some matters which I conceive might be transacted with a government *de facto,* such, for instance, as the reforming of the unfriendly restrictions on our commerce and navigation, such as you will readily distinguish as they occur." On March 12, 1793, Jefferson again disclosed to Morris his views on the question of the recognition of the new French government. This classic statement follows:

> I am sensible that your situation must have been difficult during the transition from the late form of government to the reëstablishment of some other legitimate authority, and that you may have been at a loss to determine with whom business might be done. Nevertheless when principles are well understood their application is less embarrassing. We surely can not deny to any nation that right whereon our own government is founded—that every one may govern itself according to whatever form it pleases, and change these forms at its own will; and that it may transact its business with foreign nations through whatever organ it thinks proper, whether king, convention, assembly, committee, president, or anything else it may choose. The will of the nation is the only thing essential to be regarded. On the dissolution of the late constitution in France, by removing so integral a part of it as

the King, the National Assembly, to whom a part only of the public authority had been delegated, appear to have considered themselves as incompetent to transact the affairs of the nation legitimately.

Edmond C. Genêt had been appointed minister to the United States representing the new French Republic and was on his way to assume his duties. Morris had informed the Secretary of State that Genêt had left France with the intention of committing definite un-neutral acts in favor of France while in the United States. President Washington called the cabinet together on April 18, 1793, and submitted a number of questions for its consideration. Among other questions, he asked:

1. Shall a proclamation issue for the purpose of preventing interference of the citizens of the United States in the war between France and Great Britain, etc.? Shall it contain a declaration of neutrality or not? What shall it contain?
2. Shall a minister from the Republic of France be received?
3. If received, shall it be absolutely or with qualifications; and if with qualifications, of what kind?
4. Are the United States obliged by good faith to consider the treaties heretofore made with France as applying to the present situation of the parties? May they either renounce them or hold them suspended until the government of France shall be established?

The cabinet expressed its opinion in regard to the first two questions only. As to question 1, it was agreed that a proclamation of neutrality should be issued forbidding citizens to take any part in hostilities and enjoining them from doing anything contrary to the standards of neutrality. As to question 2, it was agreed that the minister should be received. As to question 3, it was decided that this question and the subsequent questions should be postponed to another day.

These questions involved Jefferson and Hamilton in a notable controversy which resulted in the formulation of our policies of *de facto* recognition, non-intervention, and neutrality. Jefferson held that all acts by public agents under the authority of the nation were acts of the nation and could not be annulled or affected by any change in the form of government or of the principles administering it. The treaties in question, therefore, were treaties between the United States and France and not between the United States and Louis Capet, and, in spite of the fact that both nations had since changed their form of government, both had remained in existence and the treaties had not been annulled thereby. Jefferson concluded, therefore, that the

treaties were still binding without regard to changes in government. Hamilton took a more expedient view. He briefly recited the facts in order to strengthen his contention. The treaties, he said, were between the United States and the King of France, his heirs and successors. A new constitution accepted by the king had not changed the status of things. The seizure of the king and the declared suspension of the royal government was effected by a body unauthorized to destroy any other constituted authority. No convincing evidence had been produced against the king. Among other irregularities, the king had been put to death, which brought up the question whether or not this was an act of national justice. That the new government was irregular and had not established itself, was evidenced by the fact that all Europe regarded it as an act demanding determined intervention to restore the royalty to power. The question then was concerning the future government of France—would the royal authority be restored or would a republic be established? Hamilton's contention was that the facts and circumstances proved that the revolution was not a free, regular, and deliberate act of the French nation.

While arguing from different points of view in this controversy, Jefferson and Hamilton made possible the policy of the United States before its actual application took place. The questions were submitted by Washington to the cabinet before Morris informed the President of Genêt's plans in America. An appraisal of the value of the opposing arguments depends somewhat upon the fact that these men had different points of view. To Hamilton, the circumstances were the determining factor, justifying renunciation on the ground of danger to the United States. He held the same view of the French government as the enemies of France held, and he thought the American view should be identical with the European. Jefferson took a more academic and a more liberal view, with a greater appreciation of the duties of the United States under treaties, and yet with a due regard for American rights and interests as well. Jefferson regarded the French government as regular and the treaties as binding because, since every nation had the right to change its form of government, the alliance of 1778 existed between nations and not between governments. He accorded the revolutionary government both a *de jure* and a *de facto* character. Hamilton, on the other hand, while he admitted the right of a nation to change its government at will, denied that an alliance need be continued by a change in government. If the revolution were consummated and the government established and recognized with strength to secure the performance of the alliance, the treaty would

hold; but he took into account the probable circumstances. Without determining the *de jure* status of the French government (for which reasonable doubt was entertained), Hamilton refused to accord to the new French government a *de facto* character until it had established itself. With all Europe in arms, refusing to recognize the government as *de facto,* and intervening to restore the monarchy, the United States could not be guilty of a breach of neutrality by continuing an alliance with a government not as yet able to maintain itself, but would be guilty of an act of intervention by being the ally of a government the rise of which many governments regarded as in itself a ground for intervention. By insisting upon a reservation of the question of suspension and annulment until the circumstances of the case could be examined, and by declaring for the renunciation of the treaties, which in itself was a denial of the *de facto* character of the French government, Hamilton attempted to commit the United States to the extreme policy of abandoning treaty relations with a government which proved itself able to offer effective resistance to nearly all of the states of Europe, on the grounds of non-recognition and intervention by enemy states opposed to the liberal form of government adopted by the French nation. To have followed Hamilton's course would have constituted a disparagement of revolution, both as a right and as basis of governmental succession, would have led to a test of governmental efficacy common to the Old World but antagonistic to our principles, and would have led to an unwarranted discrimination between the French state and the French government. It would also have meant the unnecessary suspension or annulment of treaties at a time most likely to provoke war. Jefferson's view was the one adopted. With the likelihood of being called upon to perform dangerous obligations a matter of doubt, Jefferson declared that one ground alone would justify renunciation—the preservation of the life of the state. In defense of this, all alliances would be put aside. Some of the obligations might be useless or disagreeable, but they could be dealt with through diplomatic channels when the question should arise, and did not justify suspension. He recognized the right of revolution (through which means our government was founded), and recognized no distinction between a state and a government by reason of the government's liberal or revolutionary character, or the character of opposition entertained by intervening enemy states. His test was purely a *de facto* one. His dealings with the French government as Secretary of State with respect to the alliance and the war fully justified the wisdom of his course and definitely established his connection with

the origin and adoption of the policies of non-intervention, neutrality, and *de facto* recognition.

Recognition of the Spanish-American States.—The first application of *de facto* principle on a broad scale was made in the case of the new states of Spanish America. Napoleon invaded Spain in 1808 and installed his brother Joseph Bonaparte on the Spanish throne. Certain juntas were organized in Spain to further the loyalist cause of the deposed monarch. The American juntas were organized at first in support of the loyalist movement and against the Napoleonic government. The Spanish loyalist movement did not take kindly to the similar movement in America, and it became the nucleus of the independence movement, which soon became formidable. In 1810 the inhabitants of Caracas revolted. This junta accredited two representatives to the United States and sent letters informing that government of their separation from Spain. President Madison declared in a message to Congress, "An enlarged philanthropy and an enlightened forecast concur in imposing on national councils an obligation to take a deep interest in their destinies, to cherish reciprocal sentiments of good will, to regard the progress of events, and not to be unprepared for whatever order of things may be ultimately established." This part of the message was referred to a special committee of Congress, which reported a joint resolution on December 10, 1811, to the effect that the Congress beheld "with friendly interest the establishment of independent sovereignties by the Spanish provinces in America, consequent upon the actual state of the monarchy to which they belonged; that, as neighbors and inhabitants of the same hemisphere, the United States feel great solicitude for their welfare, and that, when those provinces shall have attained the condition of nations by the just exercise of their rights, the Senate and House of Representatives will unite with the Executive in establishing with them, as sovereign and independent states, such amicable relations and commercial intercourse as may require their legislative authority." It is not intended to follow the many revolutions and negotiations in connection with the Spanish-American states, except to point out the main principles which were applied in the leading cases. After a number of representations had been made to the United States, a commission was appointed in 1817 to examine into conditions existing in South America and to report to the Congress concerning them. The commissioners made the investigations and embodied them in separate reports. They were not empowered to carry on negotiations with revolutionists or to take any steps in the direction of recognition.

They were, in a sense, fact-finding bodies, but it is doubtful whether they rendered any real service. In fact, it is sometimes intimated that they were merely used to postpone a consideration of the question of recognition.

President Monroe was anxious to determine American responsibility and discretion insofar as the new states were concerned. He therefore asked the following questions of his cabinet:

1. Has the executive power to acknowledge the independence of new states whose independence has not been acknowledged by the parent country, and between which parties a war actually exists on that account?
2. Will the sending or receiving a minister to the new state under such circumstances be considered an acknowledgment of its independence?
3. Is such an acknowledgment a justifiable cause of war to the parent country? Is it a just cause of complaint to any other power?
4. Is it expedient for the United States at this time to acknowledge the independence of Buenos Aires or any other part of the Spanish dominions in America now in a state of revolt?

No decision was reached in regard to these questions. On the whole, the cabinet seemed opposed to the recognition of the independence of Buenos Aires. The administration was somewhat uncertain as to the policy which it should pursue. There was, however, no lukewarmness or uncertainty on the part of Henry Clay, who on December 6, 1817, declared his intention to move the recognition of Buenos Aires and probably of Chile at the next session of the Congress. The South American agents began to press the matter of recognition and announced to the Department of State that they had full power to enter into treaty relations with the United States. The Monroe administration refused to take any steps until the commissioners had rendered their reports and until the attitude of the European powers could be more clearly defined. On March 24, 1818, Henry Clay moved in the House of Representatives an amendment to a bill which would appropriate $18,000 for an outfit and one year's salary for a minister to the government of Rio de la Plata. He supported his motion by a notable speech in which he set forth that the time was now ripe for recognizing the new American republics. The measure lost by a vote of 115 to 45. The views of Clay, which seem sound enough when considered in the abstract, were expressed as follows:

We have consistently proceeded on the principle that the government *de facto* is that we can alone notice. Whatever form of government any

society of people adopts, whoever they acknowledge as their sovereign, we consider that government, or that sovereignty as the one to be acknowledged by us. We have invariably abstained from assuming a right to decide in favor of the sovereign *de jure* and against the sovereign *de facto*. That is a question for the nation in which it arises to determine, and so far as we are concerned, the sovereign *de facto* is the sovereign *de jure* . . . as soon as stability and order are maintained, no matter by whom, we have always considered and ought to consider the actual as the true government.

Clay's defeat in his attempt to force recognition of the Latin-American states won for the executive the control of recognition, and gave to Monroe's administration time during which a definite policy might be agreed upon. An attempt was made on the part of the allied powers to mediate between Spain and the South American provinces. President Monroe, in his message of November 16, 1818, stated that the powers would probably confine their interposition to the expression of sentiments, and would abstain from the use of force. The mediation was due in large measure to the attitude of Spain. In his message of December 7, 1819, the President again called attention to the progress of the war, which at the time was operating in favor of the colonies. The provinces had enjoyed and maintained an unshaken independence. On April 4, 1820, Henry Clay again moved, in the House of Representatives, an appropriation for the outfit and salary of such minister or ministers as the President might, with the concurrence of the Senate, send to such American governments as had established and were maintaining their independence against Spain. The measure passed by a vote of 80 to 75, but nothing was done to carry the resolution into effect. At the next session of the Congress Mr. Clay again resorted to his coercive tactics. After the defeat of his motion for an appropriation, a measure eventually passed the House which declared that the House of Representatives "participates with the people of the United States in the deep interest which they feel for the success of the Spanish provinces of South America which are struggling to establish their liberty and independence, and that it will give its constitutional support to the President of the United States whenever he may deem it expedient to recognize the sovereignty and independence of the said provinces." The President's message on December 3, 1821, declared that "it has long been manifest that it would be impossible for Spain to reduce these colonies by force, and equally so, that no condition short of independence would be satisfactory to them."

The actual recognition of the Spanish-American states took place in 1822. In January of that year, the House of Representatives requested information from the President as to the condition of affairs in these states, as disclosed by the communications of the presidential agents. In transmitting this information, President Monroe accompanied it with a letter setting forth the actual posture of affairs in those republics. He pointed out that the contest had reached such a stage and had been attended with such decisive success on the part of the provinces that it merited the consideration whether their right to the rank of independent nations, with all the incident advantages in their intercourse with the United States, had not already been completed. He observed that when the result of such a contest was clearly settled, such governments had a claim to recognition by neighboring powers which ought not to be resisted. He was of the opinion that the fate of the war was settled, and that the provinces which had declared their independence and were enjoying it should be recognized. The prospect of their being deprived of their independent condition was most remote. No authentic information was at hand respecting the view of Spain or the allied powers toward this step. "In proposing this measure," said the President, "it is not contemplated to change, thereby, upon the slightest manner, our friendly relations with either of the parties, but to observe in all respects as heretofore, should the war be continued, the most perfect neutrality between them." The Committee on Foreign Affairs of the House of Representatives immediately took the matter under consideration. A unanimous report was presented on March 19, 1822, which reviewed the facts and declared that it was now just and expedient to recognize the independence of the several nations of Spanish-America without reference to the diversity in their forms of government. Moreover, it was suggested that the House of Representatives concur in the opinion of the President that these states should be recognized as independent, and that the Committee on Ways and Means should be instructed to report a bill to enable the President of the United States to give effect to such recognition. On May 4, 1822, such a bill was passed, whereby $100,000 was appropriated "for such missions to the independent nations of the American continent as the President of the United States may deem proper."

Señor Anduaga, Spanish minister to the United States, vigorously protested the President's message and the act of recognition. He pointed out that no parallel could be drawn between the emancipation of the American Republic and that which the Spanish rebels at-

tempted. He reviewed the case and declared that there were no reasons, moral or expedient, why recognition should be extended. Said he: "And in fine, where (is) the right of the United States to sanction and declare legitimate a rebellion without cause and the event of which is not even decided. . . . I think it my duty to protest, as I do solemnly protest, against the recognition of the governments mentioned, of the insurgent Spanish provinces of America, by the United States, declaring that it can in no way now, or at any time, lessen or invalidate in the least, the right of Spain to the said provinces, or to employ whatever means may be in her power to reunite them to the rest of her dominions." The rejoinder of John Quincy Adams was characteristic of the man. It was a firm, scholarly, and legal, yet courteous, statement of the policy of the United States and of its clear intention to apply that policy to the present situation. He declared that the United States earnestly and sincerely desired to cultivate friendly relations with Spain, having beheld the exertions of Spain to maintain its independence of all foreign control and its right of self-government. The *de facto* policy of the United States in recognizing new states and governments was expressed by him in the following words:

> In every question relating to the independence of a nation, two principles are involved: one of right, and one of fact, the former exclusively depending upon the determination of the nation itself and the latter resulting from the successful execution of that determination . . . this recognition is neither intended to invalidate any right of Spain, nor to affect the employment of any means which she may yet be disposed or enabled to use, with the view to reuniting those provinces to the rest of her dominions. It is the mere acknowledgment of existing facts.

Acts Short of Recognition.—American sympathy for liberal and revolutionary movements abroad has at times threatened our observance of the policies of non-intervention and neutrality. They have also at times taken the form of apparent encouragement to insurrectionists in their endeavors to establish a condition of independence. The *de facto* principle in theory takes no notice of anything but existing facts, and from this standpoint forms of government are meaningless to the people of the United States. The practice of the United States in extending recognition to *de facto* governments of previously illegal origin has had the result of extending a false hope to insurgent communities at various times in our history. In 1848 a revolutionary flare reflecting the spirit of 1789 spread throughout Europe. In

France the revolution was successful and the government which succeeded to power was immediately recognized, but in other states the movement was duly checked by the titular governments. The United States sympathized with these movements and extended the hospitality of its shores to persons who had been persecuted in the name of liberty. In the case of Hungary, our sympathetic attitude led almost to a promise of recognition. It was indeed an act falling just short of recognition. On June 18, 1849, Secretary of State Clayton issued instructions to Mr. A. Dudley Mann in regard to a mission which he was to undertake as a special and confidential agent to Hungary. The principal object of his mission was to obtain reliable information in regard to Hungary in connection with the affairs of adjoining countries, the probable issue of the revolutionary movements under way, and the chances we might have of forming commercial arrangements favorable to the United States. Should it appear that Hungary was able to maintain the independence which she declared, the United States desired "to be the very first to congratulate her and to hail with a hearty welcome her entrance into the family of nations." The prospect seemed gloomy, however, and Mr. Mann was authorized, if he thought this to be the case, to suspend his operations and to omit his visit to Hungary. These delicate and important duties were left almost wholly to his own discretion and prudence. He was to decide upon his own movements and places of destination, the particular points at which he would make inquiries, the proper mode of approaching Mr. Kossuth and his confidential adviser, and the communications he might think proper to make to them. He was furnished a sealed letter, introducing him officially to the minister of foreign affairs, and with an open copy which he was to deliver or to withhold according to the circumstances. A full power was conferred upon Mr. Mann as special and confidential agent of the United States to Hungary to conclude a commercial treaty with any authorized agent of the Hungarian government. The sealed letter was addressed to the Minister of Foreign Affairs of Hungary. Mr. Mann was introduced as special and confidential agent of the United States to the government of Hungary and there was bespoken for him "a reception and treatment corresponding to his station and to the purposes for which he is sent." The instructions contained expressions of sympathy for the Hungarian movement. Should the new government appear stable, the President would recommend the sending of a diplomatic representative and the Hungarian representative would be welcomed at Washington.

The uprising of the Magyar patriots had produced a wave of sympathy among the American people. This movement had influenced the President to be in readiness to welcome a new state into the family of nations. Kossuth, the Hungarian leader, visited the United States at a later time and urged upon the Congress and the American people a practical support of Hungarian national aims. After the publication of Mr. Mann's instructions, the Austrian chargé d'affaires, Chevalier Hülsemann, formally protested the instructions. Owing to the death of President Taylor, Daniel Webster had succeeded Clayton as Secretary of State. Hülsemann had at first protested the mission, which he declared to be contrary to international law and to the much-avowed American principle of non-intervention. Clayton replied that the instructions of Mann related only to the reporting of facts as they appeared to him in Hungary. Mr. Hülsemann's second protest was more forceful, and he again pointed out that this procedure was at variance with principles of international law. "In fact," said he, "how is it possible to reconcile such a mission with the principle of non-intervention so formally announced by the United States as a basis of American policy, and which had just been sanctioned with so much solemnity by the President in his inaugural address of March 5, 1849?" He described the strength of the Hungarian movement and Austria's success in repelling it. In reply, Secretary of State Webster in a most bombastic manner declared that the mission of Mann "would seem to be itself a domestic transaction—a mere instance of intercourse between the President and the Senate in the manner which is usual and indispensable in communications between different branches of the government." On the ground, therefore, that the instructions were published in a purely domestic communication, Mr. Webster denied the right of Austria to interfere. He seemed to ignore the fact that where domestic communications include instructions seemingly subversive to another power, they become forthwith a document of international concern. Webster made insidious comparisons between the United States and Austria as regards territory, population, sea-power, political ideals, and the principles of the different governments. A famous historian has criticised this note "as hardly more than a stump speech under diplomatic guise." Mr. Webster excused his bombastic utterances, first, because it was time to tell the people of Europe who and what we were, and to awaken them to a sense of the unparalleled growth of the United States; and second, because he wished to write a paper which would touch the national pride and make people feel sheepish and look silly who should speak of dis-

union. A motion was made to print 10,000 extra copies of the correspondence when it was laid before the Senate. Henry Clay opposed this and the motion was defeated. Clay observed that if an American state had been in revolt and a European government had sent such an agent as Mr. Mann, the matter would have created much feeling. He took the view that Mr. Webster's argument of a purely domestic transaction was unfounded. Being published to the world, its domestic character did not limit its publication. The attitude of the American government in the case of Mr. Mann was practically without precedent and could not properly be defended.

The Confederate States.—The attempted secession of the Confederate States of America from the federal union marked a reactionary course in the forward-looking recognition policy of the United States. We had achieved our independence through revolution. Moreover, we had encouraged the revolutionary idea abroad. While we had not recognized new democratic governments merely for their own sake, we had not based our recognition policy on the principles of either legitimacy or illegitimacy. The net result, however, of the application of the *de facto* principle was the encouragement of revolutionary movements. At once the Department of State classified the rebellious movement in a totally different category. It was regarded as an illegal and unconstitutional act and purely a domestic sedition. The principles of international law and the usual course of the United States in foreign affairs did not apply to the case. In fact, even when the movement had become formidable, the Department of State denied it a *de facto* status. In February, 1861, President Jefferson Davis appointed commissioners from the Confederate States to the United States. They sought an interview with Secretary Seward, and requested that they be received as the accredited commissioners of the Confederacy, which they described as an independent nation *de facto* and *de jure*. Their declared object was to secure a peaceful solution of the existing difficulties. Lincoln, in his inaugural address, attempted to make the secession a question purely of constitutional law. He could not admit, he said, that the southern states had either in law or fact withdrawn from the Union, or that they could do so. He pointed out that the duties of the Secretary of State did not embrace domestic questions arising between the several states and the federal government, and that he must declare to the Confederate commissioners that he could not recognize them as diplomatic agents or correspond or communicate with them. The attitude of the United States was that the Confederacy was not a new state, was not inde-

pendent, and could not be regarded as a foreign state. The rebellion was purely a domestic movement to be dealt with as such.

Secretary Seward gave himself unreservedly to preventing the recognition of the Confederacy by the European powers. Lord Lyons, the British minister at Washington, declared in a letter to Lord John Russell, British Foreign Secretary, that Seward would be a dangerous foreign minister, and expressed his fear that Seward would make political capital of the relations between the United States and Great Britain. He observed that Lincoln's party, if not actually engaged in the Civil War, would probably attempt to divert public excitement to a foreign quarrel. Seward, on April 1, 1861, gave evidence of Lord Lyons' rather accurate prophecy by setting forth in a memorandum to the President some observations which he called "Some Thoughts for the President's Consideration." He referred to the operations of Great Britain, France, and Spain in Mexico for the collection of debts. The demands, he thought, if acted upon would serve to prevent a domestic conflict and would give him practical control of foreign affairs. The memorandum follows:

> I would demand explanations from Spain and France, categorically, at once.
>
> I would seek explanations from Great Britain and Russia and send agents into Canada, Mexico, and Central America, to rouse a vigorous continental spirit of independence on this continent against European intervention.
>
> And if satisfactory explanations are not received from Spain and France, Would convene Congress and declare war against them.

On February 28, 1861, Mr. Black, Buchanan's last Secretary of State, addressed an identic note to all ministers of the United States instructing them to use their influence to prevent European recognition of the Confederacy. He pointed out that certain persons claiming to represent the Confederacy would seek such a recognition. The states, he declared, as set forth in the President's message, had no constitutional power to secede from the Union. On March 9, 1861, Seward, who had become Secretary of State, addressed a similar note to all ministers of the United States. A copy of the President's inaugural address was transmitted to each minister. "It sets forth," said Mr. Seward, "clearly the errors of the misguided partisans who are seeking to dismember the union, the grounds on which the conduct of those partisans is disallowed, and also the general policy which the government pursues with a view to the preservation of domestic peace and order, and the maintenance and preservation of the federal

union." On April 10, 1861, in a letter to Charles Francis Adams, American minister to Great Britain, Seward took special pains to urge a withholding of recognition. He pointed out that the British Empire itself was an aggregation of diverse communities covering a large proportion of the earth and embracing one-fifth of its entire population. Such a recognition might at some future time provoke an unpleasant retaliation on the part of the United States. He declared that the recognition of a new state was the highest possible exercise of sovereign power, because it always affected the welfare of two nations and often involved the peace of the world. There was a greater necessity for prudence in such cases in regard to American states than in regard to the nations of Europe. He declared that the several nations of the earth constituted one great federal republic, and that they should act toward one another in the direction of the least injury and the greatest good. This implied a scrupulous regard for the rights of each member, including that of not encouraging the dismemberment of any one of them. These circulars soon resulted in assurances by the foreign governments that there would be no case of premature recognition and that the government of the United States would be duly informed of such action as might be taken.

After the secession movement became more formidable, foreign states, especially the maritime powers, were compelled to define their relation to the conflict. On April 19, 1861, Lincoln issued his famous proclamation establishing the blockade of the southern coasts. The logical step was taken by Great Britain on May 13, of the same year, when a proclamation of neutrality was issued. The government of Great Britain had thus recognized the belligerency of the Confederacy. However, President Lincoln had done so in applying the principles of blockade, a purely belligerent right and measure, to the southern coasts. Seward protested against the proclamation. He declared: "That proclamation unmodified and unexplained would leave us no alternative but to regard the government of Great Britain as questioning our free exercise of all the rights of self-defense guaranteed to us by our constitution and by the laws of nature and of nations to suppress the insurrection." He did not, or would not, take account of the fact that the United States had first, by its own proclamation of blockade, duly recognized southern belligerency, and that neutral governments under international law had all the rights flowing to neutrals, as the United States had all the rights flowing to belligerents.

The southern states were vigilant in pressing the matter of their

own recognition. They merely stated the usual policy of the United States and applied it to their own case, pointing to the *de facto* existence of the Confederacy as their justification. Seward contended, as before, that the rebellion was purely a domestic problem for the United States to deal with, and that Southern action was illegal, as the American constitution did not admit of the principle of secession. The Confederate commissioners presented their case to Lord Russell, who heard their statements but made no reply. Seward drafted a vigorous and threatening note to the British Government, and Lincoln directed that it be sent to Mr. Adams and not be sent to the British foreign office. The wisdom of Lincoln's course in this case is clear. Adams had already protested the proclamation of neutrality and the reception of Confederate agents. Lord Russell took the ground that the proclamation of neutrality, like the American proclamation of blockade, was a domestic policy taken to protect British citizens, and that it was justified by the course of the United States. He also declared it to be the policy of the British Government to receive the agents of all communities, independent and otherwise, and to hear their story. Such a course in no sense would compromise his government. He also refused to give any pledge or promise as to any policy of recognition which future events might make it impossible, unjust, or unwise to follow.

In the celebrated Trent affair the United States intervened to prevent Confederate commissioners from stating their case to the British Government. The Southern agents, Mason and Slidell, were on board a British merchant ship. They were captured by an American naval vessel and detained on the ground that they were military persons. The British Government refused to recognize the right of a belligerent to capture and retain adherents of the Southern cause while on board British merchant or passenger ships on the high seas. Only the release of the captured persons, an explanation, and a disavowal of the act on the part of the United States prevented war. The Confederate States did not establish their independence, and no European state recognized them as independent. The position of the American Government on the question of the recognition of belligerency, however, was completely at variance with the general principles of international law, and one which, if aggressively pushed, despite the facts, would conceivably lead to war.

Cuba.—In Cuba, as in a number of countries, the question of recognition became ultimately one of intervention or non-intervention. For several years the United States had to deal with the problem of recog-

nizing the insurgent movement in Cuba. The insurrectionists were never quite able to establish their independence or even their belligerency. After a number of instances the United States took the view that an intolerable situation existed in Cuba which required abatement by the United States. The result was the resolution of intervention of April 20, 1898, which declared the people of Cuba to be free and independent. The presidential messages relating to Cuba immediately before the intervention turn on the question of intervention itself. The earlier presidential messages had to do with recognition, *de jure* and *de facto,* and the different grades of recognition as insurrection, belligerency, and independence. The most celebrated of these messages was that of President Grant of December 7, 1875. He thus described the policy of the United States:

> Where a considerable body of people, who have attempted to free themselves of the control of the superior government, have reached such point in occupation of territory, in power, and in general organization as to constitute in fact a body politic, having a government in substance as well as in name, possessed of the elements of stability, and equipped with the machinery for the administration of internal policy and the execution of its laws, prepared and able to administer justice at home, as well as in its dealings with other powers, it is within the province of those other powers to recognize its existence as a new and independent nation. In such cases, other nations simply deal with an actually existing condition of things, and recognize as one of the powers of the earth that body politic which, possessing the necessary elements, has, in fact, become a new power. In a word, the creation of a new state is a fact.
>
> To establish the condition of things essential to the recognition of this fact, there must be a people occupying a known territory, united under some known and defined form of government, acknowledged by those subject thereto, in which the functions of government are administered by usual methods, competent to mete out justice to citizens and strangers, to afford remedies for public and for private wrongs, and able to assume the correlative international obligations and capable of performing the corresponding international duties resulting from its acquisition of the rights of sovereignty. A power should exist complete in its organization, ready to take and able to maintain its place among the nations of the earth.

The Recognition of Panama.—The circumstances of American intervention in the Republic of Panama in 1903 have already been briefly discussed under the heading of Non-intervention. The question was also one of recognition. After the intervention of the United States in the friction between Panama and Colombia, the revolution

followed and independence was declared. John Hay, then Secretary of State, instructed the American representative at Panama to enter into relations with the new government when he was satisfied that "a *de facto* government, republican in form, and without substantial opposition from its own people," had been established. He was also directed to look to that government for the protection of American interests and property, and for the interests of the United States as regarded Isthmian transit. On November 13, 1903, Mr. Bunau-Varilla was received by President Roosevelt as Minister of Panama to the United States. On November 18 the treaty between the United States and Panama guaranteeing the independence of the latter in return for the right to build and fortify a canal was negotiated. Colombia immediately protested and sent General Reyes on a special mission to press the Colombian cause. He complained that the United States had intervened in a conflict between Colombia and a rebellious province and had aided in a dismemberment of a portion of Colombia's territory. He admitted that if the people of Panama had, through the force of arms, expelled the Colombian authorities and set up their own government, they would be entitled to a recognition of independence; but he said that none of these things had occurred and that the conduct of the United States was difficult to comprehend in the light of prior American practice. He further pointed out that definite aid had been given to the Panama insurrectionists by the United States, that the recognition of the Republic of Panama was premature, and that the terms of the treaty of 1846 between the United States and New Granada (now Colombia) had been violated. Mr. Hay replied that eighteen governments had recognized the revolution with the avowed object of securing the construction of the canal. The people of Panama had been guided by their own interests. Any recognition, therefore, was due to the conviction that interests of utmost importance to the civilized world were involved. This recognition was justified by President Roosevelt as follows:

> Their recognition by this government was based upon a state of facts in no way dependent for its justification upon our action in ordinary cases. I have not denied, nor do I wish to deny, either the validity or the propriety of the general rule that a new state should not be recognized as independent till it has shown its ability to maintain its independence. This rule is derived from the principle of non-intervention, and as a corollary of that principle has generally been observed by the United States. But, like the principle from which it is deduced, the rule is subject to exceptions; and

there are in my opinion clear and imperative reasons why a departure from it was justified and even required in the present instance.

In the end, the United States terminated this prolonged controversy with Colombia by means of a treaty and an indemnity. There is no doubt that Roosevelt's conduct in regard to Colombia was one of the colossal diplomatic blunders of our history. President Taft attempted to negotiate treaties with Colombia which would have the effect of allaying Colombian ill-feeling. Under the administration of Woodrow Wilson the United States agreed to pay $25,000,000 and also expressed regret for any uncordiality that had been produced between the United States and Colombia. Theodore Roosevelt, in an interesting book entitled "Fear God and Take Your Own Part," designated this as the "Panama blackmail treaty." The treaty was finally ratified during the administration of President Harding, with the omission of the clear avowal of guilt contained in the Wilson treaty.

Mexico and the Recognition Problem.—The outbreak of the revolution in Mexico of 1910–1911 brought the United States face to face with the problem of recognizing rapidly succeeding governments and pretending governments in that republic. President Diaz, in his desire to develop the material interests of the country, had provided two things necessary to secure the aid of foreign capitalists. This required settled conditions and a certain favoritism with respect to investments and industrial enterprises. The Madero revolution fell upon fertile soil. The Mexican centennial celebration in 1910, while outwardly signifying independence and satisfaction under a benevolent ruler, was marked with an emptiness which a close student of the situation could not overlook. Mexico had reached a point in history where the Diaz scheme of things could no longer satisfy. The constitutional and legal system which had been perfected through thirty years of autocratic rule to serve definite ends might have continued to work if the opportunity had been given, but there had been incurred a political opposition which threatened to upset it. It no longer satisfied or frightened a sufficient number of people to demand its continued existence or to prevent its overthrow. Change had come and Diaz, having reached the age of eighty, and having ruled over Mexico for three decades, was not the man to meet the new situation, which sprang from sources he could not understand.

The germ of discontent was spread among the Mexican people by Francisco Ignacio Madero. Evidence of the changing order of things

began to appear during the six-year term of Diaz from 1904 to 1910. In 1910 Madero entered the field against Diaz as a candidate for the presidency, and published a book describing the autocratic system of Diaz and advocating his own candidacy. Diaz imprisoned him until after the election. Deprived of his constitutional right to contest the presidency of Diaz in a fair and open election, Madero emerged from his confinement a revolutionist. The details of the Mexican revolution are of no particular concern to us in this study. The attitude of the United States toward it is very important. The Taft administration was neither actively for nor openly hostile to the Madero government. Orders were given by the War Department to entrain a number of troops of the regular army and the national guard on the Mexican border. This created a sensation throughout Mexico and greatly weakened the rather loose grip which Madero had on the country. President Taft and Secretary of State Knox complained of alleged offenses committed by Mexicans against American citizens, but on the whole the policy of the Taft administration was one of non-intervention. The conspiracy against Madero ended in the *coup d'état* of February 18, 1913, and resulted in Madero's death. General Victoriano Huerta was made commander of the troops within the federal district. On February 18, 1913, the execution of a carefully laid plot ended in the arrest of Francisco Madero and Pino Suarez. On the same day, Huerta telegraphed to the heads of the state and local governments that he had assumed charge of the government, and a statement signed by Felix Diaz and Huerta was issued to the Mexican people. On the next day the Mexican Congress accepted the resignations of Madero and Suarez, and Pedro Lascurain took the oath of office as President for twenty-six minutes, naming Victoriano Huerta as minister of Gobernacion, which appointment was confirmed, and then he resigned. This left the country without a president, vice-president, or foreign minister, and the newly appointed minister of Gobernacion, the ranking cabinet member, took the oath of office as President. The *coup d'êtat* and the rise of Huerta to the provisional presidency was thus clothed with a semblance of legality and constitutional order strongly supported by the sword. On February 22 Huerta issued a manifesto to the nation declaring that he would use "the measure of rigor that may be necessary" to restore peace. That night Madero and Suarez were killed and a signed statement issued by Huerta on February 24 asserted that the prisoners had lost their lives in an attempt to escape while their military escort was resisting the attack of an armed group. In a message to

President Taft, Huerta said, "I have overthrown the government and henceforth peace and order will reign."

The Mexican situation in its relation to the United States is largely centered in the views and acts of President Woodrow Wilson, whose declarations of policy reveal the principles which governed his attitude toward the southern republic. The first indication of such policy was contained in a public statement issued on March 11, 1913. In this statement three important points were emphasized. In the first place, Wilson held that "just government rests always upon the consent of the governed and that there can be no freedom without order based upon law and upon public consciousness and approval . . ." Moreover, coöperation so greatly desired with the peoples and leaders of America was possible only by "the orderly processes of just government based upon law" and not upon illegitimate use of force. The second point was the attitude of the United States toward the two kinds of government. All the influence of the United States would be used to encourage the adoption and practice of the principles of orderly governments, and preference would be accorded to those which were peaceful and which respected constitutional rights and restraints. The third committed the Wilson administration to a policy of non-intervention. The United States had nothing to seek in the southern republic except what he described as "lasting interests, which would not interfere with the rights and liberties of either." The significance of this statement was not fully realized until President Wilson made his policy effective by inquiring into the legal status of governments to determine their right of recognition and their right to coöperate with one government in opposition to another. President Wilson cited this statement in his speech of acceptance of the Democratic nomination for the presidency in justification of his course in Mexico. The second statement declaratory of Mr. Wilson's policy was an address delivered before the Southern Commercial Congress at Mobile, Alabama, on October 27, 1913. Here he entered into a discussion of the question of concessions in Latin-American states and of its contrast with conditions in the United States. In this country, he said, foreign capitalists were invited to make investments, and this could be regarded only as an invitation to invest, not a privilege. The financial difficulties of Latin America, due to its removal from main avenues of trade, had resulted in hard bargains at excessive rates of interest, and the granting of concessions which reduced them to such a condition "that foreign capitalists are apt to dominate their domestic affairs,

a condition of affairs always dangerous and apt to become intolerable." It was the opinion of Mr. Wilson that the effect of the Panama Canal would be to encourage an emancipation from these conditions, and that the United States would be the first to aid. Principles of equality and honor, and the determination of a foreign policy in terms other than those of material interests, were advocated by him, and morality and not expediency was to be the guiding principle. Concerning the questions of constitutional liberty and the territorial aims of the United States, he said:

> Comprehension must be the soil in which shall grow all the fruits of friendship, and there is a reason and a compulsion lying behind all this which is dearer than anything else to the thoughtful men of America. I mean the development of constitutional liberty in the world. Human rights, national integrity, and opportunity as against material interests—that, ladies and gentlemen, is the issue which we now have to face. I want to take occasion to say that the United States will never again seek one additional foot of territory by conquest. She will devote herself to showing that she knows how to make honorable and fruitful use of the territory she has, and she must regard it as one of the duties of friendship to see that from no quarter are material interests made superior to human liberty and national opportunity. I say this, not with a single thought that anyone will gainsay it, but merely to fix in our consciousness what our real relationship with the rest of America is. It is the relationship of the family of men devoted to the development of true constitutional liberty. We know that it is the soil out of which the best enterprise springs. We know that this is a cause which we are making in common with our neighbors, because we have to make it for ourselves.

In his message to Congress of December 7, 1915, Mr. Wilson again stated his policy toward the South and Central American states, with peculiar reference to Mexico as a practical illustration of the working of his policy. He referred to the time when these states were fighting for independence and the United States felt itself obliged to assume without invitation at certain times a degree of guardianship of them to prevent European interference. But altered conditions had made unnecessary the continuation of such a course, which wounded the pride and provoked the suspicions of these peoples. The Monroe Doctrine still prevailed, however, and all governments stood upon a footing of genuine equality and unquestioned independence. As regards Mexico, he stated that the United States had proved that no government would be forced upon her not of her own choosing. Citing the principles of the Virginia Bill of Rights as the "creed of free men,"

he stated: "We have unhesitatingly applied that heroic principle to the case of Mexico, and now hopefully await the rebirth of the troubled republic which had so much of which to purge itself and so little sympathy from any outside quarter in the radical but necessary process. We will aid and befriend Mexico, but we will not coerce her; and our course with regard to her ought to be sufficient proof to all America that we seek no political suzerainty or selfish control." This policy he regarded as vitally connected with his Latin-American policy as a whole, which he described as Pan-Americanism, void of the spirit of empire, but the embodiment of the spirit of law and independence, liberty and mutual service. Mr. Wilson's stated policy, then, was one of respect and preference for orderly governments based on law and regard for constitutional rights and guarantees; of discouragement of "concessions" in Latin-American states tending to control their domestic affairs; of the subordination of material interests to the interests of friendship and constitutional liberty; of the substitution of a spirit of coöperation for one of guardianship; of the right of Mexico to choose and "resume, alter, or abolish" her government as she desired; of not seeking additional territory by conquest; and of respect for the equality and independence of American nations.

Space does not permit an inquiry into the various situations which arose during President Wilson's administration and which required the intervention of the United States. An analysis of his interventions in the affairs of the Huerta government runs along three lines which do not accord with general American practice and which cannot be justified by the tests applied to them by international law. They were: first, an inquiry into the legal status of Huerta's accession to the presidency, constituting an interference in the purely constitutional affairs of Mexico; second, the abandonment of the *de facto* principle of recognition; and third, active and positive opposition to one faction and support of another in a civil contest carried on in a foreign state. To determine the legal status of a government and to pass judgment on its constitutionality, is not within the scope of a government representing a state whose relations with the government and state in question are defined by the principles of international law. The independence and equality of states signify the right of each state to determine its own form of government and to be free from all external control in the management of its municipal and constitutional affairs, since any other interpretation would subject the internal affairs of states to the scrutiny of other states. For one government to set constitutional standards for another government, and to judge the competency of

the government as to its satisfying the conditions of the standards set in the exercise of the international relations of the two governments, is clearly an interference in the constitutional affairs of the country, inadmissible under international law. It constitutes a limitation of the right of revolution which was first justified by Aristotle and which has become an accepted principle of the theory and the practice of American politics. Mr. Wilson's first statement of coöperation with, and preference for, constitutional governments based on law presumed the existence of a state of affairs in Latin America which might or might not be "constitutional," and led to the adoption by his administration of active measures to encourage the one and discourage the other. The usual practice has been to allow each state to determine the constitutional capacity of its own government. While republics have been encouraged, yet our policy has been not to interfere even in the establishment of a monarchical system. This is illustrated by statements of policy and by repeated instances in American history. Time and again Mr. Wilson reiterated his friendship for constitutional government in Mexico, and there is abundant evidence that he passed judgment on and against the Huerta government as regards its legality. In his message of December 2, 1913, he declared that Mexico had "no government" and that Huerta had "cast away even the pretense of legal right and declared himself dictator." In his speech of acceptance of the Democratic nomination for the presidency in 1916, he declared that the "unspeakable Huerta" had betrayed his creeds and had traitorously overthrown his government. His position upon the principle of constitutionality and its application to the Huerta government was stated by him as follows: "No permanency can be given the affairs of any republic by a title based upon intrigue and assassination." He declared that to be the policy of his administration within three weeks after he assumed the presidency. He again avowed it when he said, "I am more interested in the fortunes of oppressed men and pitiful women and children than in any party rights whatever."

In the same speech Mr. Wilson described the revolution as "inevitable and right," and yet such a course as he followed limits the freedom of choice and makes of the government of Mexico something chosen at the will of another. It might or might not correspond to the will of the Mexican people. The correctness or incorrectness of Mr. Wilson's estimate of the Huerta government is of no concern to us. The point is that Mr. Wilson made common cause with the "suppressed peoples of Mexico" and passed upon the efficacy of a purely constitutional matter of another country, contrary to gen-

eral American practice and unsupported by international law. Granting the correctness of his judgment, the fact of interference is not altered, nor can it be denied that Mexico's government is subject to the will of outside forces. The condition of affairs described in the President's message of December 2, 1913, was sufficient cause for actual intervention to terminate an intolerable situation, and such would have been in accord with American policy and sanctioned by international law. In such a case American intervention would have been addressed against a particular situation and not against a government *per se.*

A second departure from ordinary practice had to do with the question of recognition. In dealing with the problem of recognizing Huerta, Mr. Wilson ignored the *de facto* principle of recognition, which along with the non-intervention principle has constituted perhaps the most valuable contribution of the United States to the practice of international law and diplomacy, and which for the most part has enjoyed a consistent practice since its formulation by Thomas Jefferson in 1793. The Huerta government was at first the only effective claimant for recognition, but later the rise of the Constitutionalists brought about a condition creating parties to a civil conflict with which the United States had very ill-defined relations. In the recognition question, as in the question of constitutional status, the limits of our interest should be defined in order that the issue should not be confused in this rather complicated case. Recognition or refusal of recognition of the Huerta government was clearly within Mr. Wilson's right as executive. Due care in determining whether or not the Huerta government was entitled to recognition was commendable, for the function of recognition is a serious one, as are the consequences of it. It was a question of fact whether or not the Huerta government could perform its international obligations. If Mr. Wilson had applied this test and had found that the Huerta government could not meet these conditions, his duty under American practice and under international law would have been clear. If the opposite had been found to be the case, and if recognition was refused on other grounds, the result was an ignoring of the *de facto* principle and an inquiry into governmental efficacy not permitted by international law. But Mr. Wilson carried the matter much further. When he declared that he would never recognize the Huerta government, he completely destroyed the *de facto* potentialities of that government, and whether or not such a state existed, the operation of the principle was made impossible. In his message of December 3, 1913, he declared: "There

can be no certain prospect of peace in America until General Huerta has surrendered his usurped authority in Mexico; until it is understood on all hands, indeed, that such pretended governments will not be countenanced or dealt with by the United States." In his speech of acceptance in 1916 he said: "So long as the power of recognition rests with me, the government of the United States will refuse to extend the hand of welcome to anyone who obtains power in a sister republic by treachery or violence." These statements connect the recognition question with the constitutional question already discussed in the preceding paragraph; but it was definitely stated that the United States would never recognize the Huerta government, no matter whether that government's *de facto* existence was established, or whether the government proved itself capable of discharging international obligations competently. With the fact of governmental existence and competency as the proper test, Mr. Wilson not only refused to apply it, but created a situation where the application of the test was made impossible even to a government which might become the actual machinery for the expression of the will of the state. Non-recognition on these grounds not only constituted an ignoring of the *de facto* principle, but resulted in our having no defined relations with respect to the parties to a civil strife, and in having diplomatic and mediatory relations with, and in committing acts of war against, a government which Mr. Wilson regarded as no government at all, and which he declared the United States would not countenance or deal with.

A third result of President Wilson's course in Mexico was the determined opposition of the United States Government while Huerta was the only effective claimant to the control of the country, and the actual commitment of the United States in favor of one party and against another party in a civil contest, when the Constitutionalists began to dispute the ability of the Huerta government to maintain itself. We have seen that in the Civil War, the Confederacy argued for its recognition on the basis of its *de facto* existence, and that Mr. Seward combatted this on the allegations that domestic strife was strictly an American affair and that the southern attempt to secede was illegal. Seward did not consistently deny to foreign governments their right to exercise the prerogative of recognition either as belligerents or as independent nations, based upon a definite state of facts, for this would have been a denial of the *de facto* principle, and it became necessary for the neutral maritime powers to define their relations to the conflict. Actual intervention by European powers, however, was something which Seward feared and which he labored courageously

if not altogether wisely to avoid. Mr. Wilson, in the Mexican situation, did not avail himself of the privilege of recognition in order to define the relation of the United States Government to the Mexican conflict. He did intervene, as illustrated, by declarations of policy and by positive acts to overthrow the Huerta government and to give active aid to the Constitutionalists in order to make that party the government of Mexico. Recognition of Mexico's inability to set its own house in order and intervention to bring about a condition of stability, if based upon sufficient facts, would have been a legitimate procedure, as were the Cuban interventions of 1898 and 1906. But the frequent interventions in Mexico were directed, not against a situation *per se*, but against a government exercising a fair degree of control, accepted by the state governments, and recognized by several of the states of Europe; and later directed against that government in behalf of another government. The practical effect on the Huerta government was much the same as if the United States had been a party to the conflict. It weakened Huerta in that the moral pressure of the United States was used against him; it strengthened him in that the United States Government was forced to recognize the effectiveness of his organization,—just as the United States was forced to deal with the belligerency of the Confederate States as a fact. It had the effect of directing to Huerta the support of many hostile groups as the protector of the dignity and sovereignty of the Mexican nation against foreign intervention in its political affairs. The Lind Mission was essentially an effort to rid Mexico of the Huerta government. The taking of Vera Cruz is justified by the "Democratic Text-book" of 1916 as a movement to show Mexico that "Huerta, the desperado and murderer in temporary authority of Mexico City, must go." By various utterances President Wilson declared himself absolutely hostile to the Huerta government. In his message of August 27, 1913, his policy was determined to be the "steady pressure of moral force," directed against the continued rule of Huerta. Positive opposition to Huerta was also accomplished by positive aid to the Constitutionalists. In his speech of acceptance in 1916 the President declared "that the men who overcame him [Huerta] and drove him out, represent at least the fierce passion of reconstruction which lies at the very heart of liberty; and so long as they represent, however imperfect, such a struggle for deliverance, I am ready to serve their ends when I can." There could be no plainer statement of a policy of political interference against one party and in behalf of another.

The various interventions of Mr. Wilson in Mexico were directed

toward the establishment of a certain social order and a certain scheme of things which he thought should prevail, but the policy of the Wilson administration in opposition to the Huerta government and in support of the Constitutionalists in Mexico, and in opposition to the liberal party and in the support of the Menocal government in Cuba, in a sense was similar to the methods of the Holy Alliance, and has contravened developments since that time. Both the Holy Alliance and the Wilson administration supported kinds of governments without positive evidence of the will of the nations concerned. Both were based upon ideal conceptions, one constituting a denial, the other a limitation, of the right of revolution. Mr. Wilson favored the revolution against Huerta because he thought it represented the will of most of the Mexican people, and because it represented what he thought was best for them. In spite of declarations to the contrary, Mr. Wilson's policy has more or less assumed, as Mr. Monroe denied, the theory upon which the Holy Alliance acted, and a practice not in accord with our general policy must to some extent have the effect of curtailing its future usefulness. With the Holy Alliance, intervention and actual support was accorded to "legitimate" governments. With the Wilson administration, it was the succession of "constitutional" and "legal" governments. The principle of intervention against one party and for another is the same in both cases. It has been clearly asserted that Mr. Wilson thought that the Madero government represented the revolution, which he took to be an awakening to the needs of the people. Like the Holy Alliance, Mr. Wilson stood for what he wanted to succeed, viewing it as a social necessity. It is argued that kinds of government and forms of intervention must yield to the larger question of the rightness of the thing desired or one's belief in the rightness of the thing desired. The fact remains that the view was Mr. Wilson's and not that of the Mexican people. It may be that the success of the revolution in Mexico has justified so great a departure from American practice; and it is also possible that a sacrifice of the *de facto* principle will help to prevent or discourage revolutions. Along with the relinquishment of the principle, however, will probably flow certain disadvantages which did not exist before.

The Constitutionalists, with Carranza as their First Chief, had been recognized by the United States. Due to certain massacres of American citizens in New Mexico by Villa, the United States sent an expedition south of the border in the summer of 1916 to apprehend this daring bandit. This was done without the consent and against the

protest of the Constitutionalists. Mr. Lansing, in his correspondence, described the Carranza government as a *de facto* government and as unworthy of that name unless it could protect the life and property of foreign citizens within its borders and prevent its own citizens from making incursions into friendly territory. The United States entered the World War in 1917, and the Mexican question gave way to the larger interests in Europe. A new Mexican constitution was adopted in 1917, certain articles of which affected adversely the personal, property and corporate rights of foreign citizens. A movement against Carranza made rapid headway, resulting in his assassination and in the succession of de la Huerta to the presidency. On September 5, 1920, the people of Mexico elected Alvaro Obregon as president, and he, in due course, assumed control of the government.

On October 26, 1920, the Mexican government made overtures to the United States in the direction of resuming formal diplomatic relations. R. V. Pesqueira, confidential agent of the Mexican government, informed Secretary of State Colby that peace reigned from border to border in Mexico, that not a single rebel was in arms against the federal government, and that the whole nation thought in terms of law, order, and reconstruction. As evidence of this, he cited the peaceful election of General Obregon. He declared that his government was ready to establish a joint arbitration commission to pass upon and adjudicate the claims presented by foreigners on account of damages occasioned during the revolution. He declared that the retiring and succeeding presidents had made repeated and public declarations to the effect that Article 27 of the Mexican federal constitution was not, and should not be, interpreted as retroactive and violative of valid property rights. Mr. Colby, in reply, acknowledged these evidences of intention to abide by the general principles of international law, and suggested that commissioners be designated by both countries to formulate a treaty and embody the agreements which Mr. Pesqueira has suggested. On June 7, 1921, Secretary of State Hughes declared that the safeguarding of property rights against confiscation was the fundamental question confronting the United States in considering its relations with Mexico. He set forth that Mexico was free to adopt any policy she pleased with respect to her public lands, but that she could not destroy, without compensation, valid titles which had been obtained by American citizens under Mexican laws. "A confiscatory policy," he declared, "strikes not only at the interests of particular individuals but at the foundations of international intercourse, for it is only on the basis of the security of property

validly possessed, under laws existing at the time of its acquisition, that commercial transactions between peoples of two countries and conduct of activities in helpful coöperation are possible." He pointed out that the question should not be confused with any matter of personalities or with the recognition of any particular administration. When it appeared that Mexico as a government was willing to bind itself to the discharge of primary international obligations, Mr. Hughes declared, concurrently with that act its recognition would take place. Accordingly, he suggested that a treaty providing for the settlement of claims for loss of life and property and for the establishment of a claims commission be agreed to by both states. President Obregon in his message to the Mexican Congress on September 2, 1921, discussed the renewal of relations with the United States. He declared that the Department of State at Washington had the idea of guaranteeing the interests of Americans in Mexico by means of a treaty prior to renewal of diplomatic relations between the two countries. He objected to the draft as submitted by the United States on the ground that it was contrary to some of the principles of the constitution. He declared that it would give rise to unjustifiable advantages in favor of Americans resident in Mexico, or in general, of one group of foreigners over the rest, and what, to his mind would be worse, over the Mexicans themselves. He declared that the demand that the executive of Mexico should enter into negotiations in advance in order to secure recognition would be unjustifiable in the light of international law. Such an act would be a lessening of the national dignity. A year later President Obregon, in addressing the Congress, disclosed the modified plan to the United States in its negotiations with Mexico. He agreed to the negotiation of conventions providing for the adjustment of claims through commissioners appointed for the purpose. Upon conclusion of the conventions it would be the policy of the United States to extend its recognition, after which both Mexico and the United States would sign the treaties thus negotiated. The attitude of the United States was disclosed by Mr. Hughes in a notable speech delivered in Boston on October 30, 1922:

> Our feeling towards the Mexican people is one of entire friendliness and we deeply regret the necessity for the absence of diplomatic relations. We have had no desire to interfere in the internal concerns of Mexico. It is not for us to suggest what laws she shall have relating to the future, for Mexico, like ourselves, must be the judge of her domestic policy. We do, however, maintain one clear principle which lies at the foundation of international intercourse. When a nation has invited intercourse with other na-

tions, has established laws under which investments have been lawfully made, contracts entered into and property rights acquired by citizens of other jurisdictions, it is an essential condition of international intercourse that international obligations shall be met and that there shall be no resort to confiscation and repudiation. We are not insistent on the form of any particular assurance to American citizens against confiscation, but we desire, in the light of the experience of recent years, the substance of such protection, and this is manifestly in the interest of permanent friendly relations. I have no desire to review the history of the past. The problem is a very simple one and its solution is wholly within Mexico's keeping.

On May 2, 1923, desiring to reach a satisfactory settlement with Mexico respecting questions at issue between the United States and Mexico, President Harding, on recommendation of the Secretary of State, appointed Charles Beecher Warren and John Barton Payne as American commissioners to meet two Mexican commissioners for the purpose of exchanging impressions. The Mexican commissioners were Ramon Ross and Fernando Gonzalez Roa. Mr. Warren, the head of the American commission, had enjoyed a large experience in international law and diplomacy and was fresh from his experience as ambassador to Japan, where he had laid the foundations for the famous Washington Conference. He was a lawyer by profession and represented conservative interests. John Barton Payne was a prominent Democrat who had been Secretary of the Interior in Wilson's administration and was President of the American Red Cross. Ramon Ross was a personal representative of President Obregon and did not take a very active part in the proceedings. The Mexican case was presented and defended by Señor Roa, who was a lawyer by profession, and had written books on the right of the average citizen through government action to expropriate large landed estates. At one time he had been a law officer in the Mexican foreign department. The conferences were held in Mexico City from May 14 to August 15, 1923. Many delicate questions were raised, and only the infinite tact and patience of Mr. Warren prevented a rupture. The famous Article 27 of the Mexican constitution was under constant discussion. The most embarrassing questions concerned the right of expropriation of property by the Mexican agrarian commissions, state and national, under the agrarian laws of the various states and under the Mexican constitution. Some of these laws and decrees permitted the division of large estates, both Mexican and foreign, through a process of condemnation. Compensation was to be made in terms of agrarian bonds, of state and national issue, and at not more than 10 per cent above the

assessed value of the land. Thus the procedure was entirely to the advantage of the Mexicans participating in the division. The agrarian issues were practically worthless, and it was the position of the American commissioners that payment in these terms would virtually be confiscation. Again, it was urged that the doctrine of *ejidos* should not be unfairly applied against American owners. *Ejidos* were parcels of land assigned in the days of Spanish occupation to Indians for cultivation. Most of these small allotments of soil had fallen into the hands of other owners. The Mexican government insisted that the original owners or their descendants had a right to these lands. The United States declared that these American purchasers for value should not be deprived of their property rights without compensation. The conversations resulted in a special claims convention for the settlement of claims of American citizens arising from revolutionary acts in Mexico from November 20, 1910, to May 31, 1920, and a general claims convention providing for the settlement of claims by the citizens of each country against the other, except those claims which were covered in the special claims convention. The conventions were ratified by the two governments and the claims commissions constituted under them have now substantially completed their labors. The commissioners also submitted a report of the understanding reached with the Mexican commissioners concerning subsoil and agrarian matters. This was approved by the President of United States and the President of Mexico. Diplomatic relations were resumed by the two countries on September 3, 1923, and Charles Beecher Warren was accredited as American Ambassador to the Republic of Mexico. Thus the long period of suspended diplomatic relations between the two countries was brought to an end.

The resumption of relations with Mexico brought up in concrete form the reconciliation of revolutionary aims with the personal and property rights of aliens, especially Americans. The Department of State has, on a number of occasions, deemed it necessary to make vigorous protest against the alleged retroactive application of the Mexican constitution, laws and decrees, to the property and contract rights of American citizens, acquired in good faith and for a consideration, prior to such legislation, and often at the solicitation of the Mexican government. A widespread American opinion urged the arbitration of American issues with Mexico. President Coolidge replied that his government would arbitrate the question of the fact and amount of injuries, but he regarded the principle of confiscation as

not in its nature arbitrable. Both governments are disposed to settle outstanding issues by negotiation.

The Question of Russian Recognition.—Russia was one of the leading parties to the World War. She at first supported Serbia against the unreasonable demands of Austria, and originally entered the war on the side of the Allies. For a time it seemed that the theater of the war would be transferred from the western to the eastern front. However, forces from within were working to bring about the defection of Russia, due chiefly to growing discontent and social unrest. As time went on, the burdens and exactions of the war caused the average Russian to become war-weary and to long for a rest-cure for the ills of continued conflict. As the aims of the Imperial government came to light, interest in it weakened. The people distrusted their government and ceased to support it. The government, in turn, pursued a policy of suspicion and oppression, oblivious to the fact that a government which does not have the confidence of its subjects cannot compel their allegiance during an unpopular foreign conflict. The court was corrupt and the empress was subject to the influence of effeminate and wicked men. The priest Rasputin, a man of bad reputation and scandalous behavior, completely dominated her under the guise of spiritual ministrations. German propaganda played a large part. The court soon lost interest in the Great War, and all energies were bent in the direction of preserving the autocracy. Revolution was the inevitable result. In the chaos that followed, the Czar abdicated and indicated as his successor, his brother, the Grand Duke Michael. The Duma, under the leadership of the Social Democrats, set up a provisional government consisting of a minister chosen from it and accountable to it. This government was recognized by the United States and was commended by the liberal governments throughout the world. Kerensky became the head of the provisional government. It was essentially a government of the business and professional classes, but, in the view of the radical parties, did not go to the root of the trouble. It professed the constitutional reorganization of Russia after the fashion of the western liberal powers and the United States. The Social Democrats and the Socialist Revolutionists did not want middle-class rule, but contended for a complete economic and social revolution to be followed by absolute control by the workers. The breach between the Kerensky government and the Soviet influences widened. The United States sent a mission to Russia under the leadership of ex-Senator Root to stimulate Russsian interest in the war. A loan was extended to

the Kerensky government, in the hope that Russia might again take her place beside the Allies and against Germany, but this failed. The Bolshevists aimed: first, to make peace with the Teutonic powers; second, to usher in a social and economic revolution; and third, to establish a scheme of government based on the system of Soviets. These aims were accomplished respectively by the treaty of Brest-Litovsk, which took from Russia her great grain-producing regions; by decrees which destroyed the Kerensky government and transferred the control of government, industry, and agriculture into the hands of the workers; and by the all-Russian Congress of Soviets which met at Moscow on July 10, 1918.

Under the Russian constitution the rights of the laboring and exploited people only are granted. All able-bodied men are required to work. Private ownership in land is abolished and all power is invested in the working classes. Only producers can vote and hold office. Persons who employ labor for profit, who live on profit from incomes without working, merchants, tradesmen, and brokers, monks and members of the clergy, employees and agents of the former police, and members of the old *gendarme corps,* are excluded. Representation is on an occupational rather than on a district or geographical basis. Power is transferred from a ruling class to a particular class or group from the exercise of which all other classes are expressly excluded. At the Paris peace conference Lloyd George proposed that all of the Russian factions meet in Paris to decide matters between themselves and to select representatives with whom the Allies could deal in an authoritative manner. The Russian negotiations, including the celebrated Prinkipo proposal and the unfortunate Bullitt mission, ended in failure. Finally, a decision was reached to support Admiral Kolchak. The Allied blockade of Russia was a retaliatory measure designed to bring Russia to terms. In time it was partially raised, and was first lifted altogether by Great Britain who wanted her trade.

The United States Government, with the support of the Russian-American Chamber of Commerce, refused to have commercial dealings with Soviet Russia on the ground that her purchase money had not been properly obtained, and for some time was consistent in this stand. In the south of Russia, General Wrangel assumed authority. France recognized his government in the hope that the French people might realize at least the interest payments on Russian government bonds held by French peasants and other citizens. Late in 1920 American and Allied troops were withdrawn from South Russia, Siberia, and Archangel. Such men as Kolchak, Deniken, and Yudenitch were

eventually defeated and the Soviet Government today remains in its dominant position. The question of the recognition of Russia continues to be a troublesome one. The United States has steadily refused to extend recognition on the ground of the government's lack of a *de facto* character. The question of de factoism was probably uppermost in President Wilson's mind at first, for he realized that Russia's millions could have no expressed will. This was seemingly an application of the same principle which had been extended to the Huerta case in Mexico.

There is little doubt that much opposition to the recognition of Russia proceeds from the fact that the principles of Sovietism are so revolting to the spirit and ideals of the American people. It is essentially a communistic form of government. Together with American objection to the form and purpose of the government is the policy of the Soviets to make their revolution an international movement and to press their case against all organized governments everywhere. Secretary of State Colby declared: "There can be no mutual countenance, nor trust, nor respect even, if pledges are to be given and promises made with a cynical repudiation of their obligations already in the mind of one of the parties. We cannot recognize, hold official relations with, or give friendly reception to a government which is determined and bound to conspire against our institutions, whose diplomats will be agitators of dangerous revolt, whose spokesmen say that they sign agreements with no intention of keeping them." Senator Borah of Idaho introduced in the Senate a resolution declaring that "The Senate of the United States favors the recognition of the present Soviet government of Russia." Senator Lodge, in a notable speech delivered in the Senate on January 7, 1924, spoke against this resolution. He declared that the so-called Russian Soviet Republic should not be recognized by the United States because the Russian government, directly or indirectly, in one form or another, was endeavoring to cause disorder and dissension among the American people, and was advocating actions and agitations which if successful would result ultimately in the radical alteration and perhaps the destruction of our present form of constitutional government, their immediate purpose being to get possession of the labor unions of the United States. After a careful analysis of the structure, extent, and nature of the Soviet government, he sought to establish that the Russian Communist party exercised complete control at times amounting almost to the identification of party and Soviet organs, that the Russian Communist party and the so-called Soviet government were con-

trolled and dominated by a small group known as the political bureau, that the Russian Communistic party founded and controlled the Communistic International, and that the so-called Soviet government, the Third Internationale, and the Russian Communistic party were interdependent organizations and movements. He further declared that the doctrines presented by the representatives of Russia were not in accord with the beliefs and principles of the American people, and that it was not time to accord official recognition and approval to a government whose representatives would come among us and, under the diplomatic shield, break up our own labor organizations, attack American laws and American freedom, and kindle the flames of riot and disorder throughout our country. He described the Soviet government as "an active and insidious enemy working under our flag against all the beliefs and institutions which Americans hold most precious." A sub-committee of the Committee on Foreign Relations of the Senate was appointed to conduct hearings on the resolution to which Mr. Lodge so eloquently addressed himself, and such hearings were held an January 21, 22, and 23, 1924. Another objection to the recognition of Russia had to do with her refusal to honor the obligations of previous governments. The Bolshevists announced that they would never repay loans contracted by the old régime. While this referred to the debts of the Czarist government, it also applied to the loans advanced by the United States to the Kerensky government, the immediate predecessor of the Soviets. President Coolidge in resisting this position declared: "Our government does not propose, however, to enter into relations with another régime which refused to recognize the sanctity of international obligations. I do not propose to barter away for the privilege of trade, any of the cherished rights of humanity. I do not propose to make merchandise of any American principles. These rights and principles must go wherever the sanctions of our government go." Secretary Hughes, in response to the delegation of the Women's Committee for the Recognition of Russia, made, on March 21, 1923, the following significant declaration:

> I recognize fully the distinction between matters exclusively of economic import, and the questions of diplomatic relations. As I said to the representatives of your organization a year ago, the fundamental question in the recognition of a government is whether it shows ability and a disposition to discharge international obligations. Stability, of course, is important; stability is essential. Some speak as though stability was all that was necessary. What, however, would avail mere stability if it were stability in the prosecu-

tion of a policy of repudiation and confiscation? In the case of Russia, we have a very easy test of a matter of fundamental importance, and that is of good faith in the discharge of international obligations. I say that good faith is a matter of essential importance because words are easily spoken. Of what avail is it to speak of assurances, if valid obligations and rights are repudiated and property is confiscated? This is not a question of the rich or of the poor. It's a question of principle. Only the other day, I had a letter stating the case of two American women who had been living in Russia and invested all their savings in Russian securities, and they are poor people, dependent, and they are very anxious to know whether these securities will have any recognition.

Our own government, after the first revolution, loaned about $187,000,000 to Russia. I may say that we were the first to recognize the Kerensky government; that government did not profess a policy of repudiation. Now what did the Soviet authorities do? In their Decree of January 21, 1918, they made this simple statement: "Unconditionally, and without any exceptions, all foreign loans are annulled."

What was loaned to Russia out of our Liberty Bond proceeds, and the war loans obtained by Russia before the revolution to enable Russia to continue the war were simply annulled! Now the United States is not a harsh creditor. The United States is not seeking to press debtors who cannot pay beyond their means. But indulgence and proper arrangements are one thing, repudiation is quite another. I have yet to hear of any change in this announcement of the Soviet authorities. Suggestions which have been reported have always been coupled with impossible qualifications. This strikes at the heart of some of the suggestions which you have made in the interest of the principles of religion, which we all have at heart—good faith is the very essence of brotherly kindness. There is no hope for the success of your gospel—our gospel—of brotherly kindness in a world of hatred and in a world which is not animated by the sincerity of good faith.

Here is a simple test. We have in this case no need to speculate, as of what avail are assurances when we find properties taken, without compensation or restoration, obligations repudiated,—properties of all sorts, the investments of one of our great life insurance companies, for example.

Not only would it be a mistaken policy to give encouragement to repudiation and confiscation, but it is also important to remember that there should be no encouragement to those efforts of the Soviet authorities to visit upon other peoples the disasters that have overwhelmed the Russian people. I wish that I could believe that such efforts had been abandoned. Last November—last November, Zinoviev said: "The eternal in the Russian revolution is the fact that it is the beginning of the world revolution." Lenin before the last Congress of the Third Internationale, last fall, said that "the revolutionists of all countries must learn the organization, the planning, the method and the substance of revolutionary work. Then, I am convinced," said he, "the outlook of the world revolution will not be good but excellent." And

Trotsky, addressing the Fifth Congress of the Russian Communist Youths at Moscow last October—not two years ago, but last October—said this: "That means, comrades, that revolution is coming in Europe as well as in America, systematically, step by step, stubbornly and with gnashing of teeth in both camps. It will be long protracted, cruel, and sanguinary."

Russia, finding her treasury impoverished and her capital destroyed, wanted trade with the United States. Mr. Hughes pointed out that the United States had dispensed its charity lavishly to the people of Russia. But charity, he indicated, was not enough. It is an economic problem, and humanitarian interests, however keen they may be, cannot escape the underlying and controlling facts. He disclaimed any desire on the part of the United States to interfere in the internal concerns of Russia, and recognized the right of the Russian people to develop their own institutions. But Russian hope, he declared, lay in Russian action. It was impossible to deal with matters in the control of the Russian people, matters which, until they were adequately dealt with, furnished no ground for helpfulness or for Russian recuperation. While Russia might need industry and trade, he pointed out, these could not be created by any formal political arrangements. Russia needed investments, but the conditions which invited foreign assistance were entirely in the control of Russian authorities. He further indicated that there was a great deal of fallacy in what was said about trade between Russia and other nations, for statistics disclosed that such trade was in fact relatively insignificant. He said that as Russia buys, she must have something to pay with; that is, she must produce so that she can pay. This was a rather effective answer to the demand for trade.

The American claims against Russia are estimated as follows:

(1) Claims of the United States government, including principal and interest	$251,383,489.70
(2) Russian bonds held by American citizens	75,000.00
(3) Miscellaneous claims	400,000.00

The Government of the United States does not object to the communistic form of government in Russia, nor does it seek to dictate what political institutions shall be established there. It does demand that American political institutions be allowed to develop without any interference from without—a principle which applies to the world as well as to Soviet Russia. It will not recognize any government which seeks under the guise and protection of official acts to get control

of its labor organizations. It further insists that nations inviting the United States and its citizens to international intercourse must discharge the obligations which they have contracted in good faith and for which a consideration has been paid. The passing of time would seem to confirm the Russian government as the *de facto* one. This can be determined only as the peasant sees fit to acquiesce in the Soviet régime. The denial of recognition, therefore, is not due to the lack of a *de facto* status, but, to the government's attitude toward its obligations and toward the political institutions of other members of the international community.[1]

IV. Neutrality and Neutral Rights

American Neutrality during the French Revolutionary and Napoleonic Wars: Relations with France.—The year 1789 was significant both in American and in European history. The government of the Confederation had successfully withstood the struggles of the critical period and had yielded to the "more perfect union." The Constitution of the United States became effective in that year. Washington assumed his duties as President of the United States, while Jefferson was relieved of his duties as minister to France and soon became Secretary of State. William Short was named as minister to France. In the same year the French Revolution broke out, a movement which evoked much American sympathy. It was to be the French Revolution and the Napoleonic Wars which strained American neutrality to the utmost. The political theories of Locke and Rousseau as regards natural rights, and especially as regards the right of revolution, had a deep effect in America and in France. It is difficult to determine just what part American sympathy played at this critical juncture when the American neutrality policy was at stake. A celebration was held in New York on December 27, 1792, and a "civic

[1] Representations are repeatedly made to the President and the Secretary of State in the interest of Russian recognition. Perhaps the most interesting of these was the manifesto of the "Sherwood Eddy Party," a group of clergymen, Y. M. C. A. secretaries and welfare workers which visited Russia in the summer of 1926. Their report indicates a government in undisputed sway, an improved economic and social status, and a less violent revolutionism. Yet, a party of a million people control the destinies of a population of 140,000,000; government is the monopoly of the Communist party; criticism by the minority is not tolerated; and only the "elect" of the "proletariat" have political power. An immense army is maintained. The Russian government has neither acknowledged its financial obligation to the United States, nor has it abandoned its program of world revolution by force. President Coolidge did not accept the recommendation of the Eddy party.

feast'' occurred in Boston on January 27, 1793. Many popular demonstrations were held. The term ''citizen'' became widely adopted. Jefferson, in a letter to Monroe dated May 5, 1793, said that the war between France and England was rekindling the spirit of 1776, and declared: ''A French frigate took a British prize off the capes of Delaware the other day and sent her up here. Upon her coming into sight, thousands and thousands of the yeomanry of the city crowded and covered the wharves. Never before was such a crowd seen there, and when the British colors were seen reversed and the French flag flying above them they burst into peals of exultation. I wish we may be able to suppress the spirit of the people within the limits of a fair neutrality.''

The Government of the United States was not overwhelmed by the enthusiasm of the people, but took a conservative view of the entire situation. If American sympathy had been pronounced France would have had good reason to expect substantial aid from her ally. It was fortunate at this time that Washington and Jefferson controlled our foreign affairs. In his first inaugural speech, and in his first annual address to Congress, Washington did not place much stress on the subject of foreign relations. He did, however, advocate provision for the national defense and the extension of foreign intercourse. In his second annual address, December 8, 1790, he reminded Congress that the situation in Europe should invite America to greater circumspection in maintaining peace, that the tendency of a war could not be overlooked and should be met by preparation for war. He prophesied commercial troubles and recommended action to guard against them. Washington's private correspondence with Lafayette reveals a wholesome attitude toward Europe, but it also reveals a desire to remain at peace with the world. He observed that the guarantee of peace caused the people to appreciate and uphold the government. Consistently with his avowed policy, he made no statements favoring or justifying the liberal movement in France, except to Lafayette and on the occasion of the acceptance of the constitution by the French King.

When the war approached, in 1793, Washington was alert to the dangers which might threaten America. On April 12, 1793, he wrote to Secretary of State Jefferson that ''war having actually commenced between France and Great Britain, it behooves the government of this country to use every means in its power to prevent the citizens thereof from embroiling with either of those powers by endeavoring to maintain a strict neutrality.'' On April 18 he presented to the cabinet the following question: Shall a proclamation issue for the purpose of

preventing interference of the citizens of the United States in the war between France and Great Britain? Shall it contain a declaration of neutrality or not? What shall it contain? As to this question, it was "agreed by all that a proclamation shall issue forbidding our citizens to take part in any hostilities on the seas or against any of the belligerent powers, and warning them against carrying to any such powers any of these articles deemed contraband according to the modern usage of nations, and enjoining them from all acts and proceedings inconsistent with the duties of a friendly nation to those at war."

Morris, minister of the United States to France, had explained that Edmond C. Genêt had set out for the United States with three hundred commissions which he intended to distribute to such persons as would fit our cruisers in American ports to prey on British commerce.

The arrival of Genêt at Charleston, South Carolina, on April 8, 1793, marked the beginning of many annoying acts on his part. Before he had delivered his credentials or before he had even been recognized as minister to the United States, he at once began fitting out and commissioning privateers. On May 23 he wrote to Secretary of State Jefferson suggesting that the United States anticipate the stipulated payment of its debt to France by furnishing provisions and military stores. The Secretary of the Treasury was of the opinion that there was no need of assigning any reason for non-compliance, since by the terms of its contract the United States was not bound to make the payments. The Secretary of State, however, thought that a reason should be assigned. On June 11 Jefferson politely refused the proposal of the French minister.

Great Britain at once protested against making the United States a base of operations against her commerce. The British ship *Grange* was seized by a French cruiser within the capes of the Delaware. It was the opinion of Attorney-General Randolph that the vessel had been seized in neutral waters and that restitution should follow. Hamilton favored restitution on the ground that the jurisdiction of the United States excluded the exercise of authority by France within American territory, except by express consent or by treaty stipulation. On June 5 Jefferson wrote to Genêt:

> After fully weighing again, all the principles and circumstances of the case, the result appears still to be, that it is the right of every nation to prohibit acts of sovereignty from being exercised by any other within its

limits, and the duty of a neutral nation to prohibit such as would injure one of the warring powers; that the granting of military commissions within the United States by any other authority than their own, is an infringement on their sovereignty, and particularly so when granted to their own citizens, to lead them to commit acts contrary to the duties they owe their own country; that the departure of vessels, thus illegally equipped, will be but an acknowledgment of respect, analogous to the breach of it, while it is necessary on their part, as an evidence of their faithful neutrality.

Genêt replied:

The United States, friends of the French, their allies and guarantees of their possessions in America, have permitted them to enter armed and remain in their ports, to bring there their prizes, to repair in them, to equip in them, whilst they have expressly refused this privilege to their enemies.

In a note of June 22, 1793, he attempted to defend the propriety of a military expedition within the United States against Great Britain. While actually engaged in aiding France in America, he was jealous that the United States should be a faithful ally. He urged that the American Government prevent the fitting out of armed vessels hostile to France in American ports, and further demanded that the British privateer *Jane* be ordered away from American ports. Finally, he demanded that the American Government protect American rights and maintain the security of the American flag against British aggression.

On August 23, 1793, Jefferson asked for the recall of Genêt. On September 18 Genêt made a vigorous reply, complaining of ill-treatment and humiliation, attacking Washington for slighting him and Hamilton for abusing him, denouncing the incompetency of the courts, and finally appealing to the people as against the government. On December 25 he disavowed any activities on his part to recruit an armed force within the United States, but he did admit the granting of military commissions to American citizens in South Carolina for that purpose. On January 20, 1794, Washington in a message to Congress stated that the conduct of Genêt had been unequivocally disapproved, and that his recall would be expedited without delay. Jefferson, in writing to James Madison, referred to Genêt's appointment as "calamitous" and referred to him personally as "hot-headed, all imagination, no judgment, passionate and disrespectful." In compliance with a reciprocal request, Washington recalled Morris as

minister to France, at the same time expressing his highest regard for Mr. Morris.

The recall of Genêt ended a severe test of the American policy of neutrality favored by both Jefferson and Hamilton and adopted by Washington. In a communication of May 3, 1793, Genêt stated that his government had charged him "to propose to your government, to establish, in true family compact, that is, in a national compact, the liberal and fraternal basis on which she wished to see raised the commercial and political systems of two people, all whose interests are confounded." The proposal was a definite invitation to strengthen the former alliance and, had it been accepted, would have led to intervention in the European war. The practical renunciation of the French alliance and the refusal of the United States to form either a "family" or a "national" compact established more firmly the American policies of non-intervention and neutrality.

The neutral policy of the United States is closely related to the policy of non-intervention. Both developed simultaneously, and the observance of one required the observance of the other. The treaties of 1778 concluded with France almost led the United States into the European wars following the French Revolution, an intervention prevented only by the strictest adherence to the policy of neutrality. But there was a further responsibility. The maintenance of neutrality, together with the duty of the United States as the champion of neutral rights, made the policy of non-intervention difficult to uphold. Attention will be given the questions of neutrality and neutral rights only as they affect the development of a general policy. The relation between the two policies of neutrality and non-intervention is clear. Among the influences which contributed to the adoption and the maintenance of both policies were the following: (1) physical separation from Europe: (2) a new state in a new continent, with a form of government entirely different from those of Europe at the time; (3) the apparent advantages of a policy of separation from European alliances maintaining the troublesome principle of the balance of power.

The rights and duties of neutrals had not been clearly defined. The attitude of the United States toward the European conflict was to be of epoch-making importance. The French treaties, already discussed, complicated this problem. At the meeting of the cabinet held on April 19, 1793, it was decided that a proclamation of neutrality should issue, and it was actually issued on April 22 as follows:

Whereas it appears that a state of war exists between Austria, Prussia, Sardinia, Great Britain, and the United Netherlands, of the one part, and France on the other; and the duty and interest of the United States require, that they should with sincerity and good faith adopt and pursue a conduct friendly and impartial toward the belligerent Powers:

I have therefore thought it fit by these presents to declare the disposition of the United States to observe the conduct aforesaid towards those powers respectively; and to exhort and warn the citizens of the United States carefully to avoid all acts and proceedings whatsoever, which may in any manner contravene such disposition.

And I do hereby also make known, that whatsoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations, by committing, aiding or abetting hostilities against any of the said Powers, or by carrying to any of them those articles which are deemed contraband by the *modern* usage of nations, will not receive the protection of the United States, against such punishment or forfeiture; and further, that I have given instructions to those officers, to whom it belongs, to cause prosecutions to be instituted against all persons who shall, with the cognizance of the courts of the United States, violate the law of nations, with respect to the powers at war, or any of them.

In spite of the efforts of the United States to maintain a strict neutrality, its relation to the wars growing out of the French Revolution continued to be perilous. With the renewal of the war between England and France in 1803, the Republican party, under the leadership of President Jefferson, was forced to grapple with the problem anew. Whatever sympathy Jefferson may have had for France did not in any war alter the consistent policy of a "fair neutrality" which he advocated while Secretary of State and rigidly adhered to as President. Whatever clamor had existed for the formation of a French alliance in 1793 had absolutely disappeared by 1803. There was no time, however, when the great majority of citizens did not uphold the government in its policies of non-intervention and neutrality.

While engaged in preventing violations of American neutrality, the United States Government was equally concerned with the protection of commercial and neutral rights. The French decrees and the British orders in council threatened the very existence of neutral commerce as well as the sanctity of neutral rights. The question as to how far belligerents could prey upon neutral commerce was fully as important as the question of neutrality. John Jay concluded a treaty of amity, commerce, and navigation with Great Britain on November 19, 1794. Its object was to settle the question of neutral rights as far as the United States and Great Britain were concerned. By article

XVII it was provided that enemy goods could be taken from neutral vessels. By article XXIII, asylum was granted to ships of war. By article XXIV, privateering was forbidden to any persons holding commissions from any state at war with either country. The negotiation of the Jay Treaty with the most effective enemy of France made clear the position of the United States as a neutral power, and rendered American intervention on the side of France an impossibility.

The displeasure of France was expressed by additional decrees against neutral commerce, and by complaints officially directed against the United States. On March 9, 1796, the French Minister of Foreign Affairs communicated to Mr. Monroe the complaints of the French Republic against the United States. The first general complaint related to the non-execution of treaties. The first example was "the submission to our tribunals of the cognizance of prizes brought into our ports" by French privateers, in spite of the treaty clause covering the subject. Mr. Monroe answered that "those rights which are secured by treaties form the only preference in a neutral port which a neutral nation can give to either of the parties at war; and if these are transcended, the nation so acting makes itself a party to the war, and, in consequence, merits to be considered and treated as such." In answer to the complaint that English ships of war had been admitted to American ports in contravention of Article XVII of the commercial treaty of 1778, it was declared that the enemies' warships were not barred by the treaty except when accompanied by prizes. As regards the judicial proceedings against the captain of the *Cassius,* it was stated that while the treaty (Article XIX) stipulated that "the commandants of vessels, public and private, shall not be detained in any manner whatever," yet it contained no stipulation as to the right to arm, and failure to have proceeded judicially would have amounted to a collusive breach of neutrality. M. de la Croix complained of the outrage committed by a British frigate and aided by a British consul against the French minister, on the ground that the punishment inflicted by the United States was not commensurate with the indignity imposed. The revocation of the consul's *exequatur* and the expulsion of the British vessel from American waters, combined with a formal protest to England, was all the United States could do, since there was no effective fleet. In support of the last general complaint that by the Jay Treaty the United States had "knowingly, and evidently sacrificed their connections with the republic and the most essential and least contested prerogative of

neutrality,'' M. de la Croix alleged that the United States had departed from the principles of the armed neutrality and to the prejudice of France had abandoned the limits of contraband, having even extended contraband to include provisions. Monroe answered that Great Britain had never acceded to the principles of the armed neutrality, and that the United States had agreed upon the most liberal list of contraband which Great Britain would recognize.

The French minister, M. Adet, presented other complaints to Mr. Pickering, Secretary of State. He protested that the United States had questioned whether or not it should execute the treaties, ''or receive the agents of the rebel and proscribed princes.'' It was replied that the conduct of the United States as proved by the facts, was exemplary; and on account of the rapid succession of revolutionary events, the American Government had the right to deliberate. To the charge that the President had issued ''an insidious proclamation of neutrality,'' the Secretary of State answered that the object of the proclamation was to preserve the United States in a state of peace, to be observed by an impartial neutrality. M. Adet was also reminded that the French ministers had declared that the French government did not desire the United States to enter the war. Protests were made against Hamilton's instructions to the collectors of the customs, against the neutrality laws, the treatment of French privateers, the Jay Treaty, and favoritism on the part of the United States to England. The blockade of the French colonies, Mr. Pickering stated, was an active one and binding on all neutrals alike. He also contended that the United States had aided France in various ways, citing as examples the aid given M. Genêt, the payment of the debt to France, and the aid given in relation to the insurrection in Santo Domingo.

In spite of the efforts to reply satisfactorily to the complaints of the French government, new decrees were issued, directed against neutral commerce. On August 22, 1796, Mr. Pickering informed Mr. Monroe of his recall, and Mr. C. C. Pinckney of South Carolina was named as his successor. M. de la Croix informed Mr. Monroe that the Directory would ''no longer recognize nor receive a minister plenipotentiary from the United States until after a reparation of the grievances demanded of the American government, and which the French republic has a right to expect.'' Mr. Pinckney was directed to leave France, and was even denied the privileges of a resident alien. A new decree was issued by the French Directory, the substantial effect of which was to declare a ''general and summary confiscation of American vessels.'' In February of the next year Mr. Pickering filed formal

complaints against the French government for alleged interference with American commerce.

The suspended diplomatic relations made the situation more serious. The President of the Directory, Barras, said in an unfortunate speech:

> France . . . strong in the esteem of her allies, will not abase herself by calculating the consequences of the condescension of the American government to suggestions of her former tyrants. . . . They will weigh, in their wisdom, the magnanimous benevolence of the French people with the crafty caresses of certain perfidious persons who meditate bringing them back to their former slavery.

In a message to a special session of Congress, May 16, 1797, President John Adams reviewed the relations of the United States with France. He complained of the insults to Pinckney, but he was more enraged at the speech of Barras, which he thought more serious because it was dangerous to American independence; for, while it was studiously marked with indignities to the American government, it also suggested the separation of the people of the United States from its government. He recommended that such insults should be decisively repelled so as to convince France and the world that the United States was "not a degraded people, humiliated under a colonial spirit of fear and sense of inferiority, fitted to be the miserable instruments of foreign influence, and regardless of national honor, character, and interest." On May 31, 1797, Pinckney, John Marshall, and Francis Dana were nominated as ministers to France (Elbridge Gerry finally replacing Dana), and they were given plenary power to settle all differences with France. Protection was given them by Talleyrand, but a formal reception was at first refused.

Three gentlemen, known as X, Y, and Z, suggested that as a *douceur* for the members of the Directory who had been offended by the President's message, a sum of money would be required, and that a loan to the government would also be necessary. Pinckney called attention to the fact that he had been treated with great disrespect, but said that he would treat for a reconciliation on honorable terms jointly with his colleagues. Finally, after some negotiations, the American envoys offered to send one of their number forthwith to America to interview the government concerning a loan, if proceedings in regard to captured American ships were suspended. Later the envoys informed the intermediaries that, in spite of the course of the

Directory, they would have to guard the interest and honor of America; and further, that they would no longer hear propositions from persons having no authority to act. A new decree was issued January 17, 1798. On January 28 a formal review of the question between the two countries was submitted to Talleyrand. In March an audience was granted. The matter of a loan, the Jay Treaty, and other questions were mentioned. The ministers disclaimed all authority to agree to a loan. Talleyrand informed them that he would be disposed to treat with the one whose opinions were most impartial (meaning Gerry). They replied that negotiations could only be considered jointly, whereupon Pinckney and Marshall left France. Gerry remained, only to be recalled.

The treatment accorded the American representatives aroused much hostility in the United States. President Adams said in a message to Congress: "I will never send another minister to France without assurance that he will be received, respected, and honored as the representative of a great, free, powerful, and independent nation." Measures were taken to prepare for war. It was the opinion of the Attorney-General of the United States not only that actual maritime warfare existed between France and the United States, but a maritime war authorized by both nations. The indignation of the United States caused Talleyrand to alter his course. Through the French legation at The Hague he suggested that any minister sent to France by the United States would receive the treatment demanded by President Adams in his message of June 21, 1798. Our participation in the war against France was thus narrowly averted.

Ellsworth, Davie, and Murray were sent as ministers in response to the above overture, with full powers to negotiate, but with specific instructions. They claimed that the treaties of 1778 had been abrogated by a solemn public act only after France had in many ways violated the treaty of amity and commerce. The French plenipotentiaries contended that they could not consider the treaties as annulled; there had been no state of war so far as France was concerned. They regarded an abrogation as provocation to war, and in that case would refuse to treat further unless negotiations were preceded by a treaty of peace. Since an insistence on American claims would have led to war, their consideration was postponed to avert it. The French would not agree to deal separately as regards the question of claims and treaties. A treaty was signed September 30, 1800. By Article II it was agreed that since no concurrence could be reached in respect to the treaties of alliance, amity, and commerce of 1778, and the

convention of 1788, or upon the alleged indemnities of both nations, negotiations would continue at a more convenient time. The convention and treaties in the meantime were to have no operation. Provision was made for the commercial relations between the two countries, but this article was expunged on demand of the Senate. It was agreed that the convention should be in force for eight years from the time of the exchange of ratifications. This brought to an end the long struggle between France and the United States over the treaties of 1778, which were the main factors in bringing up the questions of intervention and neutrality. The conflict over them resulted in the adoption and maintenance of the policy of neutrality.

Relations with England as regards Neutrality and Neutral Rights.— In its struggle to remain aloof from the European controversy, the United States not only had to prevent violations of neutrality on the part of its citizens and on the part of enemy subjects, but also had to defend its neutral rights. In every great maritime war, the principal question concerns the extent to which neutrals must sacrifice their interests to the interests of belligerents. It is an admitted principle of international law that neutrals may during war-time carry on a free and uninterrupted intercourse with enemy states, except when carrying contraband of war, and when attempting to violate the laws of blockade. Neutral vessels engaged in commerce with the enemy are, of course, subject to the belligerent right of visit and search. The violation of the laws of blockade and carriage of contraband of war by neutrals is attended with definite penalties under international law and, generally speaking, under the national law of the enemy states. The limits of blockade and of contraband had not, at that time, been definitely established or agreed upon. It was, therefore, difficult to hold the enemy states, especially France and Great Britain, to account for their unwarranted extension of blockade and contraband limits. It was then, and is now, an admitted principle that belligerent property on the high seas is subject to capture by an enemy state. An effort was made, however, to exempt enemy property from seizure when carried in neutral vessels. This is designated by the phrase "free ships, free goods." The celebrated declaration of the Empress Catherine of Russia, in 1780, related to the protection of the rights of neutrals. It set forth in brief the principles that neutrals were entitled to trade with enemy states, that there was a definite limit to contraband lists, that a blockade to be effective must be maintained by a force sufficient to render access to the blockaded port dangerous, and that enemy goods carried by neutral vessels should be exempt from

capture. The neutral powers of Europe were called the "armed neutrality," and they undertook to enforce these provisions. French decrees were directed against neutral commerce with Great Britain. The British answer was an annoying Order in Council issued on June 8, 1793, providing that all vessels carrying grain, meal, or flour, destined either to a French port or to one occupied by French armies, should be seized by British cruisers. The condition that compensation would be made for seized cargoes did not prevent the most serious violation, namely, the illegal interruption of neutral commerce. This Order in Council was followed by other annoying acts on the part of the British government.

To bring this condition of things to an end, John Jay, Chief Justice of the United States, was sent in 1794 to negotiate a treaty with Great Britain. Several controversial questions at that time complicated British-American relations. Such questions as the adjustment of debts, the payment of the compensation due the loyalists under the treaty of 1783, the evacuation of western posts, and commercial and neutral rights required discussion. War was not desired by the New England trading interests, while the central and southern states were anti-British in sympathy. Jay was instructed to obtain the right for American vessels to carry between the British West-Indies and the United States, the same cargoes as could be carried in British ships. This right was denied. As a compromise, it was agreed that the privilege could be enjoyed by American vessels, of seventy tons and under, for a period of ten years, if the United States would agree to prevent the American carriage of molasses, sugar, coffee, cocoa, or cotton from the United States or British islands to any non-American port. This provision was expunged by the Senate. The British government agreed to the determination of the disputed boundaries, to the evacuation of the western posts, and to the compensation of American citizens for unlawful seizures on the high seas. The United States, on its part, agreed to adjust the debt question. Jay failed altogether in his efforts to commit Great Britain to a policy of observing neutral rights, nor did he succeed in getting them to treat with respect to the question of impressment of seamen. The contraband list agreed upon was really larger than the previous one.

The Jay treaty was not satisfactory either to the New England merchants or to the Jeffersonian party. After considerable debate in the Senate the treaty was eventually ratified. It is notable for the three arbitrations for which it provided. One of the commissions of arbitration determined that Great Britain should pay damages of $11,-

000,000 on account of British captures on the high seas. The treaty was particularly offensive to France. It not only definitely recognized the right of belligerents to take enemy goods from neutral vessels, but it also extended the right of asylum to British war ships. More important than any other consideration, it determined definitely that the United States was a neutral power and would not enter the war on the side of France.

The Napoleonic Wars, temporarily suspended by the Peace of Amiens, were renewed in 1803 when France and England reopened hostilities. American vessels again profited in the lucrative business of supplying the belligerents. We attempted to share in the trade of the colonies of the belligerents, which during peace-times was prohibited under the then universal system of colonial monopolies. To offset this practice, the British held to the Rule of 1756, which forbade to neutrals in time of war a traffic denied to them in time of peace. Neutral commerce with the belligerents raised the troublesome questions which had been at rest since the Peace of Amiens. On April 6, 1806, Charles James Fox, British Foreign Minister, announced so complete a blockade that commerce was shut off from North Sea and English Channel ports. Napoleon, by his famous Berlin Decree, declared England to be blockaded, whereupon the British retaliated by blockading all the ports under Napoleonic control. Napoleon's Milan Decree subjected to capture all vessels stopping at British ports or permitting a British vessel to visit and search them. These illegal restrictions rendered the conditions of American commerce intolerable, and continued violations of our neutral rights were committed by both England and France.

Our relations with Great Britain were complicated by the British practice of detaining American merchant ships on the high seas, and impressing into her service naturalized Americans of original British allegiance. The British held to the doctrine of indelible allegiance, which forbade a British subject to expatriate himself. If born a British citizen or subject, he was always such, and naturalization by another state could not change his status. The controversy was not over the question of claims of prior and original allegiance, but over the fact that Great Britain, under the guise of the right of visit and search, attempted to enforce her law of allegiance on American and other vessels on the high seas, where, as President Madison declared in his war message, no laws could apply "but the law of nations, and the laws of the country to which the vessels belong." The message did not recommend a war with Great Britain in express terms, but it

pointed strongly to that course. Together with the question of impressment, Madison complained of the violation by British cruisers of the American coasts, and the enforcement of fictitious blockades through the British Orders in Council. He declared: "We behold, in fine, on the side of Great Britain, a state of war against the United States; and on the side of the United States, a state of peace towards Great Britain." The message was considered in executive session. On June 18 the President signed a resolution providing for "an immediate call to arms." The war began, and continued until an armistice was agreed upon, although its conduct was somewhat inconclusive. The peace conference assembled at Ghent on August 8, 1814. The British delegation presented the subjects of impressment, the Indian question in America, and the revision of boundary lines between British territory and the United States. The American delegation suggested, among other topics, the questions of blockade and indemnities for illegal captures and seizures. Fresh instructions from the Secretary of State directed an agreement on the basis of the *status quo ante bellum,* based on the prospect of a more durable peace, and the resulting greater security for maritime rights. The treaty was signed at Ghent on December 24, 1814. Nothing was said in regard to impressment, blockade, fisheries, or the navigation of the Mississippi River. The *status quo ante bellum* was restored; efforts would be made to settle the international boundary questions; Indian hostilities were to cease; and both powers were to try to prevent the slave trade. The real issues of the War of 1812 were not referred to in the treaty of peace.

Filibustering Expeditions.—When the disputes arose between Spain and her colonies in America, the former complained of violations of neutrality due to expeditions which were being fitted out in American ports, with a view to aiding the colonies in their efforts to gain their independence. The United States could not deny this, but it called attention to certain violations by Spain during the Napoleonic Wars. In all this business the United States tried to pursue a policy of strict neutrality, and nothing was done to protect Miranda and his henchmen from the consequences of their unneutral acts. The period in which these states were recognized, therefore, was marked by a scrupulous regard for our obligations under our neutrality laws, and their recognition, as we have seen, was merely the acknowledgment of existing facts. Expeditions setting out from the United States, from ports beyond our control and even beyond our defensive power, were regretted, but they could not altogether be prevented. We had a small navy and virtually no army. The territorial extent of our

country was too great to prevent them. Subsequently these expeditions were extended to the island of Cuba, the proposed acquisition of which from Spain was regarded as good policy by the slave interests in the United States. Expeditions set out from New Orleans and other ports for the purpose of making trouble in this region, and this activity took definite form in the celebrated Lopez expeditions of 1849. Lopez wanted, first to free Cuba from Spain, and then to make it a part of the United States; but his plans did not commend themselves to the Cubans. American attitude toward Cuba and our desire to purchase or seize the island had the effect of convincing Spain that we really supported the aims of Lopez. The conduct of Soulé, our minister to Spain, and the celebrated Ostend Manifesto, which justified the seizure of Cuba in case of a refusal to sell, confirmed this feeling on the part of Spain. The Cuban question was finally settled by war.

Our difficulties in maintaining neutrality were transferred to Nicaragua in 1854. Colonel Cornelius Vanderbilt received a concession from the government of Nicaragua to carry passengers bound to California across the isthmus. This was in effect a monopoly. William Walker assembled some adventurers in the United States, and took possession of the government of Nicaragua during a revolution. The government of the United States issued proclamations warning its citizens against activities of this kind. Later, President Pierce recognized the government of Walker as the only one functioning at the time in Nicaragua. While Vanderbilt was away, his partner, Morgan, secured a new contract from Walker, and had the old Vanderbilt contract annulled. Vanderbilt, upon his return, financed certain anti-Walker factions in the other Central American states. It was now a battle between Morgan and Vanderbilt. Eventually Vanderbilt was successful, and Walker, after a third expedition, was finally captured and shot. Such expeditions impaired greatly the prestige of the United States in these countries.

The Geneva Arbitration.—Confederate cruisers were fitted out in British shipyards, with the ultimate intention of preying on American maritime commerce during the Civil War. This was in direct violation of British neutrality. At length the *Alabama* and other cruisers fitted out in British ports reached the high seas and began their effective interference with American commerce. American shipping was virtually terrorized. The Captain of the *Alabama* did not bring his captured ships into a prize court because of the blockade of Southern ports. He therefore conducted his own trials, and condemned and destroyed the ships. Such losses were charged against Great Britain

on account of her unneutral act in allowing the construction and departure of the vessels. By a treaty of May 8, 1871, the question was submitted to arbitration. "Due diligence" was the test to be applied to a neutral country in the performance of its duties. The arbitral tribunal found that Great Britain had been unneutral in the cases of the *Alabama,* the *Florida,* and the *Shenandoah,* and fifteen and one-half millions were awarded to the United States as damages for these depredations on American commerce by the Confederate cruisers. There were five judges on the tribunal. An indemnity of $25,000,000 was demanded in direct damages, and many millions in indirect damages. The item of indirect damages was excluded, and the figure for direct damages was scaled down.

American Neutrality and Neutral Rights during the World War.— When the World War broke out in August, 1914, the United States at once fixed its relation to the belligerents through a proclamation of neutrality. The days of the war, before our entry on the side of the Allied Powers in April, 1917, were marked with difficulties, both in preventing violations of our neutrality and in securing proper respect for our neutral rights. The rights and duties of neutrals were involved. Great Britain, early in the conflict, declared the North Sea to be a military area, notified neutrals of a directed routing, and gave warning against the planting of mines by the German Government. The United States attempted to get the powers to agree to the rules of the Declaration of London of 1909 as regulating neutral rights and commerce during the war. Germany and Austria accepted, but Great Britain insisted on substantial modifications. Later the United States rested its claims on the existing rules of international law, and on treaties with the belligerent powers.

Since the German fleet was not in action, the leading violations of American neutral rights were committed by Great Britain. British and French censorship over messages sent by wireless or cable led to a brief controversy. This was entirely under the control of the belligerent governments. The inviolability of the mail-pouches of the diplomatic missions of the United States was recognized by all of the powers, under conditions expressly declared. The Allied governments also insisted upon the seizure of mails bound for neutral countries. Here again Great Britain was the arch-offender. Parcel post was refused the category of letters, correspondence, or dispatches. Even ordinary correspondence and general mail became subject to search and seizure, due to the alleged practice of covering enemy plans with the shield of neutral correspondence. Such intercourse formed a part

of the usual transactions of the enemy, which the Allied governments insisted they had the right to resist and prevent. The settlement of the question was completely in the hands of the belligerent powers. Several unneutral acts were committed by vessels of the British fleet, such as communicating with the American shore for supplies, and illegally taking on coal within the territorial waters of the United States. American ships were detained, and persons suspected of intending to serve in the enemy forces were removed therefrom, under the theory that our ships were guilty of an unneutral service. Some of these removals were regular, but some were irregular, and in the latter case the seized persons were released.

An annoying question was that of armed merchant ships. At the outbreak of the War, Great Britain notified the United States that she would be held responsible for injuries resulting to British interests from vessels converted to warships or armed in American ports, even though the completion of the act of conversion took place on the high seas. British merchant vessels, it was asserted, were armed for self-defense only. The position of the United States was that a merchant vessel belonging to a belligerent should not arm itself so as to avoid capture by lawful and legitimate processes. The United States was led to define its attitude toward armed belligerent vessels entering its ports, and toward an armed ship on the high seas. The presence of armament would not of itself justify attack. Ultimately we armed our own merchantmen. Congress, after an emphatic letter from the President, tabled the resolution of MacLemore, warning Americans that they should not travel on armed belligerent passenger ships, and that they would do so at their own risk.

The discussion over contraband of war was extended. It is sufficient to state that all distinctions as to contraband were broken down. The discussion as to whether or not a thing was contraband was left to the judgment of the British Foreign Office. Under the belligerent right of visit and search the British found an unrestricted means of interfering with American commerce. The purpose became one of interference rather than of mere search and discovery. Orders in Council greatly extended the limits of blockade. The British Government insisted that many of the principles of blockade were unsettled, and that a belligerent could, through effective means, cut off the sea-borne commerce of the enemy. The establishment of military zones and large blockaded areas was protested by the United States. The Department of State insisted that the blockade was ineffective, that it was not impartially applied, and that it resulted in the blockade of neutral

ports. The insistence of the United States upon the ordinary tests of a blockade under international law had little effect, so that the rights of neutrals were invaded, and the principle of the freedom of the seas, so far as neutrals were concerned, became a misnomer. Is it possible for great maritime powers, through their interference with neutral commerce and violations of neutrality, to force neutral maritime powers into the conflict on one side or the other? Unless the power of the belligerent to police the seas is restricted, such would seem to be the fate of the neutral. The nation wielding the sea-power has always won in the conflict over neutral rights. The future looks dark, unless the days of neutrality are over.

The controversy with Germany finally drew the United States into the Great War. Before the departure of the *Lusitania* from New York the passengers were warned in the New York papers against booking passage thereon. The vessel was sunk without warning on May 7, 1915, and 114 American citizens lost their lives. The American Government demanded a disavowal of the act, settlement for damages, and assurances that such acts would not be repeated. The submarine was assailed as a weapon for the destruction of commerce. The German Government explained that the *Lusitania* was armed, that Canadian troops were on board, and that American citizens were used to cover war materials with a neutral protection. The American reply pointed out that only resistance to visit and search justified such an attack, and it denied that the vessel was armed. On September 1, 1915, the German Government announced that submarines would not sink vessels without warning, where there was no attempt to escape or resist. On March 24, 1916, the *Sussex,* a French vessel, was torpedoed and again a number of Americans lost their lives. The United States warned the German Government that unless it would cease immediately its submarine warfare against freight and passenger vessels, the United States would sever diplomatic relations. The response was that in the future vessels would not be sunk without warning and without saving human lives, unless escape or resistance was attempted. The German Government reserved the right to decide its future course, unless the United States could induce Great Britain and the Allied powers to respect the principle of the freedom of the seas. It was another case in which each belligerent held neutrals responsible for the unneutral conduct of the other belligerent. The United States replied that it could not entertain or discuss the proposition that the rights of its citizens were contingent on the conduct of other governments respecting neutrals or non-combatants.

On January 31, 1917, the German ambassador informed the Department of State that England was using her naval power to compel German submission through starvation. This he described as criminal. New situations required new decisions. After February 1, therefore, all ships, including those of neutrals, found in a specified zone around Great Britain, Italy, and France would be sunk. There were some minor modifications. On February 3, diplomatic relations with Germany were severed. President Wilson informed Congress of the posture of affairs, and declared that, in case of need, he would ask for authority to take the necessary measures to protect American vessels and citizens on legitimate errands on the high seas. Later he again appeared before Congress and asked for authority to arm American merchantmen for protection. He would await the commission of an overt act before leading the country into war. Other neutral governments were not disposed to stand with the United States in the protection of neutral rights. On April 2 the President, in his war message, declared that the overt acts had taken place. Congress was called in special session. Vessels of all kinds, without regard to cargo, flag, character, destination, or errand, had been attacked and sunk without warning. The President condemned the German submarine warfare as a belligerent move against all nations, and a challenge to all mankind. After a recital of the war aims of the United States, he declared that the force of the nation would be spent to check Germany's aggression. On April 6, finally, war was formally declared by joint resolution of Congress.

In 1915 the Austrian ambassador, Dr. Dumba, had been recalled at the request of the American Department of State. He had entrusted a letter addressed to his government to the keeping of a newpaper correspondent. When intercepted, the letter revealed a plan to foment strikes in the American munition plants. The submarine question was discussed in the cases of the *Ancona* and the *Petrolite*. On April 8, 1917, the Austrian Government, as Germany's ally, broke off diplomatic relations with the United States, and in due course war was declared against Austria.

An interesting feature of our neutrality controversy was the attitude of Walter Hines Page, the American ambassador to England. His experiences are set forth in his *Life and Letters* under the caption, "Waging Neutrality." To Page, clearly enough, our neutral condition was almost a nightmare. It is difficult for the historian and observer to understand how Mr. Page personally could have been so opposed to the President's policies and at the same time continue to

serve as his agent in carrying them into effect. "Standing by" could not have been the only reason, for Mr. Page's position was ably filled by John W. Davis. There can be no doubt that life at the London embassy was pleasant for Mr. Page, and that he relished the opportunity which the appointment gave him of writing his name in history. The political and official pronouncements of Mr. Wilson's former associates which have been flooding the country are interesting for their revelations, not only of the President himself, but also of the men who worked with him. In most cases it seems that the President would have been successful, had their policies been followed and their advice taken. Perhaps the President should have been a man of more contact and wiser counsel than he was. On the other hand, he might have done better if he had chosen better advisers, or had received different advice.

Mr. Page declared in a letter to his brother that neutrality was a quality of government—only an artificial unit. No man could be neutral. He also declared that the President and the Government of the United States had, in insisting on the moral side of neutrality, missed "the larger meaning of the war," which to him was merely a movement of the Kaiser to extend his personal sway. In assigning essentially economic causes to the war Mr. Wilson had failed to make his just contribution to the side of liberalism and democracy, which were the great issues. In December, 1914, Colonel House warned Mr. Page, for the President, that he should be guarded in the expression of any unneutral feeling. The fact that the danger involved in this was anticipated by men of such divergent views as Bryan and Lansing indicated that the President was possibly right. Mr. Lansing is described in Page's *Life and Letters* as tactless in his methods, crude and irritating in his literary style, and discourteous in his statements. He was neither anti-British nor pro-German, but simply a lawyer, and American rights at sea meant to him a "case," with himself retained as counsel. If this analogy be true, Mr. Lansing at least discharged his duties as counsel with efficiency and skill, and with a certain loyalty to country, cause, and his superior officer. It is difficult to perceive what course Mr. Page, had he been President, would have followed. He seemed to advocate a complete surrender of neutral rights, at least to Great Britain. In a letter to President Wilson he declared that we were getting into "deep water" uselessly over the shipping question. "The present controversy seems here," he declared, "where we are close to the struggle, academic. It seems to us a petty matter when it is compared with the grave danger we incur of shutting our-

selves off from a position to be of some service to civilization and to the peace of mankind. In Washington you seem to be indulging in a more or less theoretical discussion. As we see the issue here, it is a matter of life and death for English-speaking civilization. It is not a happy time to raise controversies that can be avoided or postponed. We gain nothing, we lose every chance for useful coöperation for peace. In jeopardy also are our friendly relations with Great Britain in the sorest need and in the greatest crisis in her history." He asked that we "acquiesce" in the British Orders in Council, and that such rights as we have be "reserved." That Page was definitely unneutral in his attitude, and very pro-British, is the judgment of Colonel House:

September 25, 1916: Walter Page called this afternoon and we had a two-hour conference. I cannot see that his frame of mind has altered. He is as pro-British as ever and cannot see the American point of view. He hit Lansing whenever he could, but expressed profound regard for the President—a feeling I am afraid he exaggerates. He complains that Lansing discusses matters with the British ambassador without informing him. At the same time he told me with some satisfaction that Lansing said the British ambassador was totally unfit for his duties, and should be replaced by some one with a more equable temperament and one who had a better understanding of the situation. Page does not know that Lansing's opinion of the British ambassador is perhaps a shade higher than his opinion of Page himself.

He said the British resent our trying to bring about peace. . . . I did not think this was as ignoble an effort as it seemed to Page. He declares none of us understand the situation or the high purposes of the British in this war. I replied that we resented some of the cant and hypocrisy indulged in by the British; for instance, as to Belgium. Page admitted that the British would have been found fighting with France even if France had violated Belgium in order to reach German territory more effectively.

I asked Page if he thought the irritation apparent in Great Britain had increased because of our naval programme, and whether we were not getting in the same position, from the British viewpoint, as Germany. I spoke of the traditional friendship between Germany and Great Britain, which existed until Germany began to cut into British trade and to plan a navy large enough to become formidable; and I wondered whether they did not see us as a similar menace both as to their trade and the supremacy of the seas.

Page thought not, and yet he said Great Britain would never allow us to have a navy equal or superior to theirs. If we built, they would build more, although they would do it in a friendly spirit.

Page thought good relations might have been brought about with Great

Britain had we acted differently. This irritated me, and I told of the number of ways in which the United States had shown friendship and partiality for the allies, only to find our relations worse now than at the beginning of the war. I ventured the opinion that if we sent Bernstorff home and entered the war, we would be applauded for a few weeks and then they would demand more money. If the money was forthcoming, they would be satisfied for a period, but later would demand an unlimited number of men. If we did it all, they would finally accuse us of trying to force them to give better terms to Germany than were warranted.

A representative of the Department of State declared Page to be "persona grata in London," and as creating no irritation, "since he wholly agrees with the British point of view." This phase of our diplomacy deserves some attention for the reason that so many writers, following the opinion of Mr. Page, have regarded our conduct as regards our neutral rights as dishonorable. Persons who are at all familiar with our neutrality policy from the beginning find it difficult to understand the view, and impossible to share it. It was hardly dishonorable to insist upon a due respect for our simple neutral rights, or to prevent violations of our neutral position. Much of the idealism and liberalism in American diplomacy has come from our advocacy of neutral rights, and from our regard for the rights of small states. The fact that our interests ultimately dictated our abandonment of the neutral position and our entrance into the war on the side of the Allies, does not lessen the righteousness of the effort.

The President, in urging personal as well as official neutrality on the people of the United States, may have gone too far. Presidents cannot control the thoughts of the people. To him, a certain distinction would have flowed to us if we were "impartial in thought as well as in action." To urge official neutrality, however, was clearly within his right. The message was generally accepted at the time as an excellent statement of the position of the United States. He declared:

> Every man who loves America will act and speak in the true spirit of neutrality and fairness and friendliness to all concerned. . . . The United States must be neutral in fact as well as in name during these days that are to try men's souls. We must be impartial in thought as well as in action, must put a curb . . . on every transaction that might be construed as a preference of one party to the struggle before another. . . . Shall we not resolve to put upon ourselves the restraints which will bring to our people the happiness and the great and lasting influence for peace we covet for them?

Neutrality Laws and Neutrality Agreements.—The United States has given effect to its conception of neutral duty in the form of positive laws, which are often termed the "neutrality laws of the United States." The first law, passed on June 5, 1794, forbade (1) the commissioning of American citizens to serve a foreign prince or state; (2) the enlistment or hiring to enlist in the service of another state; (3) the fitting out and arming of vessels to be used in a hostile manner against countries with which the United States was at peace; (4) the commissioning of such a vessel or the augmentation of its forces; and (5) the setting on foot of military expeditions against foreign states within the territory or jurisdiction of the United States. The President was authorized to use such military forces as were necessary to enforce the law, and the federal courts were given jurisdiction over captures within American territorial waters. On March 3, 1817, a new law was passed, forbidding unneutral conduct against any "foreign prince, state, colony, district, or people." The general neutrality law of 1818 embraced and supplanted all previous ones.

The celebrated rules contained in Article VI of the Treaty of Washington with Great Britain, May 8, 1871, have been regarded as a landmark in the recognition of neutral duty. The governments concerned agreed on the following rules of "due diligence" as binding neutrals:

> First. To use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or to carry on war, as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.
>
> Secondly. Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of renewal or augmentation of military supplies or arms, or the recruitment of men.
>
> Thirdly. To exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

Various proclamations of neutrality have been issued, in order to define our relation to conflicts, and to restrain our people within the limits of neutrality. The rules of "due diligence" of the Geneva Arbitration were introduced into Article VIII of the Hague Convention of 1907, concerning the Rights and Duties of Neutral Powers in Naval

War. The phrase "due diligence" was eliminated, and each nation agreed to "employ the means at its disposal" to prevent violations. Thus the municipal and treaty arrangements of the United States became in effect internationally binding. New laws were required during the World War, due to new conditions and situations. Under a law of 1915 the government was authorized through the collectors of customs to withhold clearance from any vessel which might reasonably be believed to intend to carry fuel, arms, ammunition, men, or supplies to a belligerent, in violation of our neutral duty. Just before the end of Wilson's first administration, he asked Congress for permission to arm American merchantmen for defensive purposes. The measure was defeated, due to a filibuster in the Senate led by Senator La Follette. The President issued a statement to the effect that "a little group of wilful men, representing no opinions but their own," threatened the safety of the country. He advocated the adoption of a cloture rule in order to prevent dilatory tactics on the part of all minorities. The Senate amended its rules so as to limit, upon a two-thirds vote, each Senator to one hour in discussing any one measure before it might come to a vote. An Act of Congress of June 15, 1917, forbade sending from American waters any ship armed or converted in American waters, under any contract or with any intent that it should be delivered to a belligerent nation.

In future international controversies the former neutral position and policy of the United States will probably have at least a measure of application, until our clear and manifest interests dictate our entry into the conflict. It is hardly to be believed that we shall always be a co-belligerent and never a neutral.

V. The Pacific, the Far East, and the Open Door

Early Relations with China.—The commerce of the United States was restricted in the Atlantic Ocean by the system of monopolies, discriminations, and exclusions, but in time these restrictions yielded to the pressure of the diplomacy of the rising young democracies. American diplomatic interest was released from the West to the East, where we were seeking a share in the commerce of the Oriental states, on a basis of equality, and against difficult odds. In the early days Chinese foreign trade was carried on at Canton through the Hong merchants. No contact with the government was permitted. In 1784 the American ship *Empress of China* appeared at the port of Canton. Trade had been established with the Portuguese for three centuries,

and with the English and Dutch since the seventeenth century. Samuel Shaw was appointed United States Consul at Canton in 1790. While the right of foreign commercial representation was accorded, little attention was paid to such representatives. They were merely tolerated, and often they were hindered in the performance of their ordinary duties.

One Edmund Roberts, a Portsmouth sea-captain, was appointed by Andrew Jackson as agent "for the purpose of examining in the Indian Ocean the means of extending the commerce of the United States by commercial arrangements with the powers whose dominions border on those seas." He was to ship as a captain's clerk, and was to obtain information as to Japanese trade, and the means of opening communication with Japan. Supplied with blank letters of credence, he set out in 1832 on the *Peacock,* a sloop-of-war. After a journey of privations and suffering he arrived in Siam, and there concluded a treaty of amity and commerce with Siam. Later he concluded a similar treaty with the Sultan of Muscat. These treaties were ratified by the Senate. He died in Macao after returning to the East on another diplomatic mission. He did not succeed in negotiating a treaty with Cochin China.

As a result of the Opium War, a treaty was concluded between Great Britain and China on August 29, 1842. Under its provisions the ports of Canton, Amoy, Foochow, Ningpo, and Shanghai were opened to British trade and residence, and Hongkong was ceded to Great Britain. Thus Canton was no longer the only port open to foreign trade. This treaty led to the opening of diplomatic relations with the United States. President Tyler, in his message to Congress in December, 1842, referred to the importance of commercial relations with China. They required, he said, "at the present moment, a degree of attention and vigilance such as there is no agent of this government on the spot to bestow." He urged that a commissioner be appointed to care for American affairs, protect the property and persons of Americans, and to hold diplomatic intercourse through the Chinese officials. On March 3, 1843, forty thousand dollars was voted the President for the establishment of commercial relations between the United States and China on terms of "national equal reciprocity." On May 8 Caleb Cushing was appointed minister plenipotentiary and commissioner to China. Secretary of State Webster instructed Mr. Cushing to assert and maintain, "on all occasions, the equality and independence of your own country." The Chinese government should be impressed courteously but firmly with the fact that the government of the United

States neither gave nor received tribute or presents. Yet respect would be shown the Emperor, and the commercial regulations of the Empire should be obeyed by American citizens. Cushing arrived at Macao in February, 1844, on the United States flagship *Brandywine,* intending to proceed directly to Peking and there to present his credentials to the Emperor. The Chinese governor, Ching, urged him not to make the journey, and argued that no treaty was necessary. Delays followed, and Cushing found it necessary to call the attention of the government to his mission, and to insist upon the right of legation and of intercourse. Tsiyeng was at length chosen as Chinese commissioner and empowered to treat with Cushing. The treaty was negotiated at the village of Wang Hiya. Cushing, in his project for the treaty, suggested that the United States desired to treat on the basis of friendship and peace, that it sought no portion of Chinese territory, and that, while it was anxious to treat on the basis of opening all ports and imposing no export duties, it would be satisfied with complete trading privileges in the five British treaty ports. By the treaty, the five ports were opened to American trade. Residential privileges were given American citizens, and the right of Americans to be tried in their consular or extraterritorial courts, was established. Likewise the United States was accorded all privileges which China might extend to any other nation. This was the most-favored-nation clause. Direct correspondence between the United States Government and the Imperial Court was arranged for, but diplomatic representation at Peking was not provided. The treaty was ratified in due course, and became the foundation of our relations with China, and the first document making the "open door" policy internationally binding. The success of Cushing's mission was due to his own tact and industry. He had remarkable qualifications, and his many-sided interests remind one of the peculiar fitness of Franklin for his great diplomatic triumphs.

The treaty of Tientsin was concluded on June 18, 1858. Mr. William B. Reed, the American minister, was the negotiator. The right of diplomatic correspondence with the government at the capital was secured. The American minister was allowed to visit Peking annually, but he could not have the right of permanent residence. Six new ports were opened to foreign trade. By a supplementary convention of November 8, 1858, the adjustment of American claims against China was arranged. In 1863 Anson Burlingame became American minister to China. He resided definitely at Peking. In a letter to the consul-

general of the United States at Shanghai, Burlingame described his policy as "an effort to substitute fair diplomatic action in China for force." His policy was highly satisfactory, both to the Department of State and to the Chinese Government. He left the service of the United States for that of China in 1867. He had been engaged as a general diplomatic agent to all powers having relations with China. His visits to Europe and America improved the general condition of Chinese intercourse, and taught the nations of the world something of the progress of the Chinese. He negotiated the "Burlingame" treaty of 1868 at Washington, on behalf of the Chinese Government. Under Article VIII the United States and the Emperor of China "cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantages of the free migration and immigration of their citizens and subjects respectively from the one country to the other for the purposes of curiosity, trade, or as permanent residents." These provisions are all the more interesting, in the light of the present exclusion of the Chinese from the privileges of naturalization in the United States, as well as from the right to enter the country.

Chinese Immigration Acts and Treaties.—The immigration of Chinese into the Pacific Coast states led to a movement which demanded their exclusion from the shores of the United States. The census reports disclose that in the continental United States there were 89,863 Chinese in 1900; 71,531 in 1910; and 61,688 in 1920. Due to exclusion, death, and travel they are diminishing in number with a fair rapidity. Some are admitted to the country as belonging to the eligible classes, whereas many are smuggled over the border, especially from Mexico. The Chinese first came in considerable numbers to California during the gold rush. They entered all kinds of occupations, and there was no lack of work for them to do. Their labor was the cheapest of the unskilled classes, and next to the native-born elements they were the most plentiful. Handwork in factory, farm, garden, and laundry was their forte. Their standard of living was lower than that of white laborers. Therefore, the employing classes encouraged their immigration. Agitation against them soon developed. A miner's license was required only of them. This was also required of the Chinese in the cigar trade and other industries. The greatest difficulty was a profound race rivalry, which went deeper than any economic considerations. Differences in color, religion, language, and habits had their influence, along with the tendency to underbid the white laborers. Race riots,

starting in San Francisco, spread to neighboring states, including Washington and Wyoming, so that the movement toward exclusion soon received the support even of the employing classes.

During the early 'fifties the Pacific Coast states, and some of the cities, attempted to regulate Chinese immigration, but these measures were declared unconstitutional. In 1862 an appeal was made to the federal government. The provisions of the Burlingame treaty, already stated, were unpopular on the Pacific Coast. In 1782 the California legislature asked Congress through their representatives to urge a new treaty with China excluding certain Chinese subjects. On March 3, 1875, a law was passed, which provided for the punishment of persons importing Orientals into the United States without their consent, for the purpose of holding them to a term of service. Moreover, anyone attempting to contract in this way to supply coolie labor to another should also be subject to prosecution. On November 17, 1880, a new treaty was negotiated, which dealt with the limitation of Chinese immigration into the United States. Under its provisions the United States could, when in the opinion of its government the presence of Chinese affected the interests or endangered the good order of the country, limit or suspend such immigration, but could not absolutely prohibit it. The limitation or suspension of such residence should be reasonable, and should apply only to Chinese going to the United States as laborers. A bill was soon drafted which would forbid Chinese immigration for a period of twenty years. A system of certification, registration, and identification was established. Skilled laborers were excluded, and the courts were forbidden to admit Chinese to citizenship.

President Arthur vetoed the bill, on the ground that the system of registration was unnecessary, and that the twenty-year immigration holiday was unreasonable, and therefore a violation of the terms of the treaty. On May 6, 1882, he signed a modified law, which excluded all skilled and unskilled Chinese laborers for a period of ten years. Measures were taken to prevent abuse of the privileges extended to the privileged classes. In 1886 China offered to prevent the emigration of her laborers into the United States, and to prevent the return to this country of Chinese formerly residing here. She also asked for a treaty covering these matters. The treaty was negotiated, but China failed to approve it. On October 1, 1888, President Cleveland signed a bill prohibiting the entry of Chinese laborers into the United States. China's failure to sign the treaty was given as justification for the legislative and executive action. In 1892 the act

of 1882 was continued in effect for another ten years. Chinese laborers in the United States were required to secure certificates of identification within a year, under pain of deportation.

China again sought a treaty covering the subject of immigration, and on December 8, 1894, such a treaty became effective. It provided for the exclusion of Chinese laborers for ten years, with the understanding that those returning to China might reënter this country if they had a wife, child, parent here, or property to the value of $1000. The immigration laws of the United States were extended to Hawaii in 1898, and two years later Chinese living there were forbidden to enter the continental United States. In 1902 Senator Mitchell of Oregon and Representative Kahn of California introduced somewhat rigorous bills in regard to Chinese immigration, but the Senate, regarding them as drastic, reënacted previous bills until a treaty should be negotiated. The bill was approved by the President on April 29, 1902. China refused to extend the treaty of 1894 beyond the year 1904. In that year Congress reënacted all laws then in force on the subject, insofar as they were not in conflict with treaty obligations, and this legislation was applied to the insular possessions of the United States. No movements could take place from the islands to the continental United States, or from one archipelago to another, although they might go from one island to another within the same group. The law of 1904 still governs the immigration of Chinese.

The Open Door.—No American foreign policy is more distinctive than that of the "Open Door." The principle of the Open Door is associated with John Hay and his celebrated circular addressed to the powers on September 6, 1899. Neither the term nor the rule which it denotes, however, began with the circular. The *Federalist,* in arguing against representation on an occupational basis in the popular assembly (the House of Representatives), declared that certain classes would find representation. But "the door ought to be equally open to all," because in every walk of life there were strong minds which would rise higher than their existing situation. This was an "Open Door" in the form of equality of opportunity. The term means, as applied to the Far East, commercial equality. The principle was applied in all of the early treaties with the East to which the United States was a party, including those with Siam, Muscat, China, Japan, Hawaii, and Korea. The term was used by the American peace commissioners in 1898 when they demanded the Philippines from Spain, in order that we might maintain there "an open door to the world's commerce." The idea was adopted in principle in the treaty of peace. In

the large, therefore, the term means impartiality and equality in trade.

When the dismemberment of China was threatened, after the Chino-Japanese War of 1895, through the acquisition of leased territories and spheres of influence by the powers of Europe, the term "Open Door" was applied to a special situation. It came to mean that the powers enjoying these special spheres of influence could not claim preferential rights in trade and commerce. In this new phase of the principle, John Hay took the lead. In the fall of 1899 he addressed a circular to Germany, France, Japan, Great Britain, Russia, and Italy, setting forth the views of the United States and seeking the approval of the powers. The United States regarded freedom of trade within the Empire as meaning "freedom of trade for all the world alike." The "Open Door" policy was referred to as an effort to "secure to the commerce and navigation of all nations equality of treatment" within these spheres of influence. The United States did not admit the acquisition by any power of exclusive rights within the Chinese Empire under the agreements made with the powers, but expressed the fear that the rights of the United States insured by its treaties with China might be imperiled. To remove any doubt as to the course of the powers, and to make possible a definite understanding of the effect of such arrangements, the powers claiming spheres of interest were asked to make certain declarations. First, they were asked not to interfere with any treaty port or any vested interest within the sphere, so that the trade of nations might there be equal and free. Second, the duties on goods within the sphere should be fixed by the Chinese tariff, and levied and collected by Chinese officials, in order to prevent discriminations against American goods and to favor the nation controlling the sphere. Third, no harbor charges on foreign vessels should be levied exceeding those levied on the ships of nationals, and charges on railways for the shipment of merchandise should be the same to all shippers. This was an attempt to prevent the control of the leased areas and spheres of influence from abridging American commercial rights under treaties which in law had a uniform application throughout the empire.

The Boxer Rebellion required the action of the United States to protect the lives and property of its citizens. Here we joined forces with the powers for the accomplishment of certain defined purposes. The joint action was limited, however, both in extent and in object. We first coöperated in the military expedition which resulted in relieving the siege of the legations. We also joined in the demands for an indemnity, for the punishment of offenders, and for the restora-

tion of order. The final protocol was signed by the United States, along with the other powers, on September 7, 1901. An indemity of $330,000,000 was collected from China for all losses and damages. Six years later the United States returned the residue of its share, which amounted to $24,000,000. On July 3, 1900, Mr. Hay, in a circular letter sent to Great Britain, France, Germany, Austria, Italy, Russia, and Japan, defined the attitude of the United States "in this critical posture of affairs in China." The early rights in China, secured by treaties, were insisted upon. Wrong done to American citizens would involve an answer to this government by the authors of it. The condition of affairs at Peking was described "as one of virtual anarchy," with power in the hands of the provincial authorities, whom this government held responsible. The purpose of the President was, acting concurrently with the powers, first, to rescue all Americans in danger; second, to afford protection to American life and property; third, to guard and protect all legitimate American interests; and fourth, to prevent the spread and recurrence of a similar disaster. He said in conclusion:

> It is, of course, too early to forecast the means of attaining this last result; but the policy of the government of the United States is to seek a solution which may bring about permanent safety and peace to China, preserve Chinese territorial and administrative integrity; protect all rights guaranteed to friendly powers by treaty and international law, and safeguard for the world the principle of equal and impartial trade with all parts of the Chinese Empire.

The attitude of the powers toward the policy of the Open Door as disclosed in their responses to the note of September 6, 1899, and in later treaties concerning China, proved to be most favorable. Great Britain made the first and most favorable response. On September 29, 1899, she declared that her consistent policy in China was one of securing equal opportunity for the subjects and citizens of all nations in regard to commercial enterprise in China, and that from this policy the British Government did not intend or desire to depart. On November 30 the British Government signified its readiness to make the declarations desired by the United States with respect to the territories leased by Great Britain or the spheres of influence held by her. The German Government made a similar response, declaring that it had asserted and maintained in its Chinese possessions the principle of absolute equality of treatment of all nations with regard to trade, navigation, and commerce, and that it entertained no desire

to depart from this principle. The Italian Government on January 7, 1900, adhered willingly to the proposals of the American Government. Japan, on December 26, 1899, described the proposal of the United States as fair and just, and declared that she had no hesitation in giving her consent to it, provided all the other powers did likewise. France, on December 16, 1899, declared that she was willing to apply in her leased territories the principle of equal treatment to the citizens and subjects of all nations, especially in the matter of customs duties and navigation dues, as well as transportation tariffs on railways, if all the interested powers followed the same policy. The government of Russia declared that it had followed the policy of the Open Door by creating Dalny a free port. In case customs duties should be levied in Russian leased territory "other than Dalny, the tariff would be applied to all foreign merchandise without distinction as to nationality." The Russian circular made no mention of harbor dues or railway charges. On March 20, 1900, Secretary of State Hay addressed identic notes to the American ambassadors accredited to the powers concerned, indicating that the United States accepted their declarations of policy, and that the assent given by them was regarded as final and conclusive.

The interested powers, through declarations and treaties, further confirmed the policy of the Open Door. On October 16, 1900, Great Britain and Germany defined their mutual policies in China in the form of a treaty, agreeing that it was a matter of joint and permanent international interest that the rivers and coast should remain free and open to trade and other economic activities for the nationals of all countries without distinction. The governments agreed to uphold this principle in their own dealings, and not to make use of the Boxer complication in obtaining territorial advantages or in diminishing the territorial condition of the Chinese Empire. By the Anglo-Japanese alliance of January 30, 1902, the powers concerned declared themselves especially interested in maintaining the independence and territorial integrity of China and the Empire of Korea, and in securing equal opportunity in those countries for the commerce and interest of all nations. The second Anglo-Japanese alliance of August 12, 1905, provided for the preservation of the common interests of all powers in China by securing the independence and integrity of the Chinese Empire and the principle of equal opportunities for the commerce and industry of all nations in China. A war between Japan and Russia was threatened by reason of Russia's failure to evacuate Manchuria. On July 16, 1904, Japan demanded evacuation on the ground that

Chinese sovereignty in Manchuria must be preserved, and that Korea must be excluded from the Russian sphere of interest. The American Government requested the belligerents to localize the conflict as much as possible. This was done except as to Manchuria. The United States also sought the adherence of the powers neutral to this conflict to the principle of the Open Door, in order that concessions or special privileges would not be bargained for at the end of the war, in conflict with the Open Door policy. The governments of Austria-Hungary, Belgium, and Great Britain gave favorable replies. In June, 1905, President Roosevelt proposed that peace negotiations be conducted, and on September 5, 1905, the treaty of Portsmouth was signed between Russia and Japan. In regard to Manchuria the powers stipulated that they had no territorial advantages or preferential or exclusive concessions in impairment of Chinese sovereignty or inconsistent with the principle of equal opportunity. They also agreed not to obstruct any general measures common to all countries which China might take for the development of commerce and industry in Manchuria. In their treaty of July 30, 1907, the same powers re-affirmed the principle of equal opportunity in matters of trade and commerce. France and Japan, in an agreement of June 10, 1907, agreed to the principle of equal treatment in China for the commerce and subjects or citizens of all nations. On July 4, 1910, the Russian and Japanese governments agreed to continue the principle in effect as defined in previous treaties. The Anglo-Japanese alliance which was renewed on July 13, 1911, contained in its preamble the following provisions with respect to the aims of these powers in China and in Asia:

1. The consolidation and maintenance of the general peace in the regions of Eastern Asia and India.

2. The preservation of the common interests of all the powers in China by insuring the independence and integrity of the Chinese Empire and the principle of equal opportunities for the commerce and industry of all nations in China.

3. The maintenance of the territorial rights of the High Contracting Parties in the regions of Eastern Asia and India, and the defense of special interests in those regions.

The principle of the Open Door has been definitely announced by the United States in two agreements of foreign policy with Japan. In the Root-Takahira agreement of 1908 the two governments expressed a wish to encourage the free and peaceful development of their commerce on the Pacific Ocean. The policy of both governments

was declared to be uninfluenced by any aggressive tendencies, and to be devoted to the maintenance of the *status quo* in the Pacific region. The principle of equal opportunity for commerce and industry in China was especially stressed, and each country agreed to respect the territorial positions of the other in this region. Moreover, they engaged, in the common interest of all powers in China, to support by such peaceful means as were within their power, the independence and integrity of China and the principle of equality of opportunity for commerce and industry of all nations in that empire. In case the *status quo* thus described should be threatened or the principle of equal opportunity as thus defined should be imperiled, the governments reserved to themselves the privilege of determining what action should be taken. The term has been considerably discussed in its relation to the commerce and industry of the Far East. President Wilson's conception of the Open Door was delivered on March 18, 1913, in regard to the withdrawal of the United States from the Six-Power Consortium:

> The government of the United States is earnestly desirous of promoting the most extended and intimate trade relations between this country and the Chinese republic. The present administration will urge and support the legislative measures necessary to give American merchants, manufacturers, contractors, and engineers, the banking and other financial facilities which they now lack and without which they are at a serious disadvantage as compared with their industrial and commercial rivals. This is our duty. This is the main material interest of its citizens in the development of China. Our interests are those of the Open Door—a door of friendship and mutual advantage. It is the only door we care to enter.

In 1917 Secretary of State Lansing and Viscount Ishii, the Japanese ambassador at Washington, entered into an agreement which recognized the special interests of Japan in China by reason of propinquity. Nevertheless, the two men agreed for their governments that they "always adhere to the principle of the so-called Open Door or equal opportunity for commerce and industry in China." Moreover, they did not intend to "infringe in any way the independence or territorial integrity of China."

The principle of the Open Door received wide attention at the Washington Conference. On November 16, 1921, the Chinese delegation made the following declaration: "China, being in full accord with the principles of the so-called Open Door, of equal opportunity for the commerce and industry of all nations having treaty relations

with China, is prepared to accept and apply it in all parts of the Chinese Republic without exception." The conference adopted all of the Root resolutions, and adopted the following aim as a part of the treaty relating to policies in China: "To safeguard for the world so far as within their power the principle of equal opportunity for the commerce and industry of all nations throughout the territory of China."

While the practice of the powers has not always been in keeping with their pledges to the United States and to the world, it has had the effect of a wider application of this humane principle through the fact of universal acceptance.

Early Relations With Japan.—As already set forth, the first attempt to negotiate with Japan was through Edmond Roberts, a sea-captain of Portsmouth, New Hampshire. He was commissioned by President Jackson as agent to examine in the Indian Ocean the means of extending American commerce with the countries bordering on that sea. He was definitely instructed to obtain information with respect to Japan, and especially to recommend means of opening up communications with that country. He was instructed by Secretary of State Livingston in 1832 that the United States had in mind a separate mission to Japan. Should he find it prudent, he might use one of his blank letters of credence and present himself to the Emperor of Japan for the purpose of opening up trade. However, if he should go to Japan, he was not to go in a vessel which could not submit to the indignity of being disarmed. He was advised to charter a coasting vessel which might be convoyed by the United States sloop of war *Peacock* on which he had made his journey to Siam.

The next effort to get in touch with Japan was made in 1845. Alexander Everett, who was commissioner to China, was given full power to negotiate with Japan. He went to Macao on the U.S.S. *Columbus* under the command of Commodore James Biddle. The Commodore was instructed to determine whether the ports of Japan could be reached, and to place his squadron at Mr. Everett's disposal should he be inclined to visit them. Mr. Everett transferred his power to the Commodore, who with two ships of war anchored in the Bay of Yedo in 1846. He presented to a Japanese official a statement setting forth the object of his visit, and received a reply to the effect that Japan was not open for trade and that he must leave the country. In boarding a Japanese junk to receive the answer of the Japanese officials, Biddle was subjected to various indignities, against which he protested, and then returned to his ship. On June 10, 1851, Secretary of

State Webster instructed Commodore Aulick to proceed to Yedo with his flagship and squadron to deliver to the Emperor of Japan a letter from the President of the United States. The Commodore was given full power to negotiate with respect to the opening of ports where American vessels might dispose of their cargoes, and where American sailors and property erected on Japanese shores might be protected. President Fillmore in his letter to the Japanese Emperor declared: "I send you this letter by an envoy of my own appointment, an officer of high rank in this country, who is no missionary of religion. He goes by my command to bear to you my greetings and good wishes and to promote friendship and commerce between the two countries." Owing to the impairment of his health Commodore Aulick was not able to carry out his instructions.

The Japanese commission was thereupon intrusted to Commodore M. C. Perry. Acting Secretary of State Conrad, in a letter to the Secretary of the Navy, November 5, 1852, defined the objects of the Perry expedition. The United States sought a permanent arrangement for the care of American seamen, ships, and property in case of stress of weather on the Japanese coasts. Permission was desired for American vessels to refit or supply themselves in one or more of the Japanese ports. Moreover, it was desired that American ships be allowed to enter one or more Japanese ports in order to sell or exchange their cargoes. Commodore Perry was to make a demonstration of his entire naval force and to refer to the ill treatment of wrecked ships and crews. He was instructed to point out that the United States, unlike every other Christian country, "does not interfere with the religion of its own people, much less that of other nations." If argument and persuasion would not affect the principle of exclusion, or secure humane treatment for shipwrecked seamen, then Perry was to threaten chastisement of the Japanese in every case of cruel and inhuman treatment of American citizens or vessels shipwrecked or driven upon Japanese coasts. The Secretary of the Navy informed Perry of the naval force which he should have at his disposal, and of his duties as agent of the United States. He was described in a letter from the President to the Emperor of Japan as, "an officer of the highest rank in the navy of the United States, and commander of the squadron now visiting your imperial majesty's dominions." His object was to propose that Japan and the United States should live in friendship and should have commercial intercourse with each other. Moreover, it was pointed out that the constitution and laws of the United States forbade all interference with religious or political con-

cerns of other nations. Mr. Perry was instructed that his mission was a pacific one and that he should not resort to force except in defense of his vessels and crews, nor should he resent an act of personal violence either to himself or to one of his officers.

Perry arrived at Hongkong on April 7, 1853. On July 8 of the same year he anchored in the Bay of Yedo, twenty miles from the city of Yedo. He had determined to demand as a right and not to solicit as a favor the acts of courtesy due from one civilized nation to another. He would not submit to petty annoyances and would disregard official acts or threats which overlooked the respect due the American flag. He refused to go to Nagasaki, the only port open to foreign trade, or to deliver his letter to anybody save an officer of the highest rank. On July 14, 1853, he was received by the chief counselor of the Emperor and his coadjutor. He presented his letters of credence. They replied that they had violated the law by receiving his papers at any point other than Nagasaki, but that in deference to the President of the United States they had agreed to a relaxation of the rule. They ordered Perry to leave. He steamed further up the bay to a point twenty miles beyond the ordinary place of anchorage. He informed the Emperor that he would return in the spring for a reply to the American propositions. On February 13, 1854, he returned to Uraga with a fleet of seven vessels, and steamed to a position not far from Yedo. The Emperor's commissioners already appointed asked Perry to return to Uraga where they would treat with him. Instead, he moved within eight miles of Yedo. They agreed to conduct negotiations at a point opposite the ships. Five commissioners, four of whom were imperial princes, conducted the negotiations with Perry. In March, 1854, he landed and met the commissioners with an escort of five hundred officers, seamen, and marines in twenty-seven barges, declaring that in such cases it was necessary either to set ceremony aside or to out-Herod Herod in assumed personal consequence and ostentation. He presented a draft of a treaty to which the commissioners replied with counter propositions. Then, further to impress the natives, he established a telegraph line on the shore and also a railway line operating a locomotive and cars. On March 21, 1854, the treaty was eventually signed. The usual practice of both sides signing the same treaty was not followed due to the fact that the Japanese could not sign their names to a document written in a foreign language. By Article VII it was agreed that American vessels resorting to Simoda and Hakodate might exchange gold and silver coin, and articles of merchandise for other articles of mer-

chandise under such regulations as the Japanese Government should establish. It was further agreed that an American consul might be sent if either party should deem it necessary. Moreover, Americans were to remain, while in Japan, under the jurisdiction of American laws and tribunals. As a matter of fact, the negotiations conducted by Perry were with the Shogunate rather than the Emperor of Japan. Perry died unaware of this fact.

In 1855 Mr. Townsend Harris was appointed Consul-General to Japan by President Buchanan, and he proceeded to Simoda on the Bay of Yedo. Mr. Harris was not schooled or experienced in diplomacy, but had followed mercantile pursuits. However, he seemed to understand the Japanese mind and greatly widened the influence of the United States in that country. Evidences soon appeared of opposition on the part of the Japanese people to intercourse with the states of western civilization. It virtually took the form of a revolt on the part of the nobles against the ruler of the country. Mr. Harris, while safeguarding the interests of the United States, refused to join in harsh or oppressive measures against Japan, and limited himself to insisting upon the concessions which were provided for in the existing treaties. In the year 1857 he negotiated a treaty which extended the privileges granted under the Perry treaty, and among other things he secured the right of permanent residence for Americans at the ports of Simoda and Hakodate. The real triumph of his career was the conclusion of the treaty of July 29, 1858, and his private audience with the Shogun at Yedo, where, entirely unattended, he induced the government to enter into another treaty with the United States. He insisted upon no unjust concessions, but through rare tact and diplomacy he gained the right of diplomatic representation at Yedo, secured rights of residence and of trade at certain ports, secured the regulation of duties and the privilege of extra-territoriality for American citizens in Japan, and arranged for the toleration of religious freedom in that country. Mr. Harris, after negotiating this celebrated treaty, was succeeded by Mr. Pruyn as United States minister. Difficulties arose between the Shogun and the nobles, who had championed the cause of the Mikado. In the course of time the ruler of the provinces of Nagato and Sueoo attempted to close the straits of Shimonoseki, and in doing so he fired upon the merchant vessels of foreign powers. The naval forces of the United States, Great Britain, France, and the Netherlands joined to open the straits by force. After bombarding Shimonoseki and punishing the rebellious ruler, the powers on October 22, 1864, signed a convention with Japan under

which the latter government agreed to pay to the governments a sum of $3,000,000.

The Japanese Government constantly sought relief from the restrictive measures of control which had been inserted in its early treaties with the powers. On June 25, 1866, the representatives of the United States, France, Great Britain, and Holland signed a convention modifying the tariff of import and export duties provided for in the trade regulations annexed to the treaty of 1858. The new convention provided for specific rather than ad valorem duties. In 1872 a Japanese embassy visited Washington for the purpose of revising existing treaties. The mission failed in its object. Secretary of State Hamilton Fish pointed out that the President believed at the time that this government should act in concert with the other powers in Japan, at least until after the treaties had been revised and "until the government of Japan shall have exhibited a degree of power and capacity to adopt and to enforce a system of jurisprudence and of judicial administration in harmony with that of the Christian powers, equal to their evident desire to be relieved from the enforced duties of extra-territoriality." Japan, seeking to regain control of her revenues, continued to urge a revision of treaties. Mr. Bingham, American minister at Tokio, urged that the United States act independently in dealing with Japan. Secretary of State Fish took a different view of the situation. He pointed out that it had been the inviolable policy of this government to act in all Oriental matters in concert with the European powers, and that nothing in the present case indicated any necessity to abandon that policy. Secretary of State Everetts, who succeeded Mr. Fish, inaugurated independent negotiations. On July 25, 1878, a new convention was signed which annulled the stipulations of the conventions of 1866 and of 1858, and provided that no new convention should take effect until new agreements had been made with the other powers. In March, 1882, a conference met at Tokio to consider the revision of treaties. Mr. Bingham declared that he had been authorized to participate in the deliberations of the conference, but that he was not permitted to commit the government to any action which might be taken. Japan suggested that the questions of tariff and judicial autonomy be discussed. The conference did not reach any definite conclusions. Independent negotiations were again suggested, but the United States did nothing, due to the inaction on the part of the other powers. Mr. Hubbard, American minister at Tokio, was instructed to attend another conference for the revision of treaties on October 31, 1885. He was advised to support the claim

of Japan in making separate treaties covering the termination of the tariff and judicial administration. The purpose of the conference, as understood by Secretary of State Bayard, was to determine a common ground for the negotiation of separate and independent treaties. Count Inouye, representing Japan, made the following proposals for revision:

1. That Japan should open to foreigners who were thereby subjected to the jurisdiction of Japan outside of existing foreign settlements.
2. That the consular court should enforce Japanese laws and regulations.
3. That pending the abolition of extra-territorial jurisdiction, the rights of foreigners to acquire real estate outside the foreign settlements, except through temporary leases, should be withheld.
4. That Japan should be conceded autonomy in tariff matters and that the commercial treaty drawn up at the last conference should be put into effect.
5. That consular jurisdiction should be abolished.

The conference was terminated by Japan. Count Okuma succeeded Count Inouye. Negotiations for the removal of the restrictive treaty measures were continued. A new treaty of amity and commerce was signed by Count Okuma on February 20, 1889. Citizens of the United States were entitled to travel and reside in Japan, but could not acquire titles to land in fee simple until five years after the treaty had become effective. Consular jurisdiction was to be abolished except in the ports of Hakodate, Tokio, Osaka, Yokohama, Kobe, and Nagasaki, where it was to continue for a period of five years. It was further provided that a certain number of foreign judges should sit as associates in the Japanese Supreme Court in foreign matters. In this manner a majority of the tribunal would be composed of foreign jurists in cases of appeal to which American citizens were parties. The tariff was still regulated by treaty. The treaty proved acceptable neither to the United States nor to Japan, and failed of ratification by both. On November 22, 1894, the United States signed a treaty with Japan recognizing her fiscal and judicial autonomy. A British treaty containing the same stipulations had been signed a few months before. President Cleveland in his annual message of December 2, 1895, declared: "We have reason for congratulation in the fact that the government of the United States, by the exchange of liberal treaty stipulations with the new Japan, was the first to recognize her wonderful advance and to extend to her the consideration and confidence due to her national enlightenment and progressive character." He probably referred to the treaty of 1878, as the British removal of

fiscal and judicial limitations preceded that of the United States. On July 12, 1899, a number of ports were opened by imperial ordinance to the commerce of the world. Thus Japan, opened to the peaceful intercourse of the world by the United States, was emancipated from the vexatious measures of foreign control which had found a place in her early treaties with the western powers. In the process of emancipation, as in the act of introducing Japan to the world, the policy of the United States was distinguished by fairness, justice, and courtesy, and by a sincere desire to promote mutual friendship, confidence, and commercial advantage between the two powers through commercial and diplomatic intercourse.

Extra-territoriality.—The term extra-territoriality signifies an exemption from the operation of local law. It has been applied by states of European civilization to their citizens in countries of non-European civilization, largely in the East, due to the diversities in customs, laws, and institutions. The right of extra-territorial jurisdiction in the Far East has always depended upon express treaty agreement, and its exercise is regulated by positive legislation on the part of the country enjoying the privilege. The jurisdiction is exercised in the main by the diplomatic and consular officers of the treaty powers. By the treaty of 1844, between the United States and China, it was agreed that subjects of China who may be guilty of any criminal act toward citizens of the United States shall be arrested and punished by the Chinese authorities according to the laws of China, and citizens of the United States who may commit any crime in China shall be subject to be tried and punished only by the consul or other public functionary of the United States; and in order to secure the prevention of all controversy and disaffection, justice shall be equitably and impartially administered on both sides. It was further agreed that all questions in regard to rights, whether of property or person, arising between citizens of the United States and China, should be subject to the jurisdiction of, and regulated by, the authorities of their own government. All controversies occurring in China between American citizens and subjects of other powers should be regulated by treaties between the United States and such governments respectively, without interference on the part of China. In case controversies arose between American and Chinese subjects which could not otherwise be settled amicably, such controversies should be reviewed by the public officers of the two nations jointly, and decided according to justice and equity.

This was the first treaty of extra-territoriality between the United States and a Far Eastern government. The legislation of the United

States was made in pursuance of treaties authorizing extra-territorial jurisdiction, and in the main regulated and defined the judicial functions of ministers and consuls of the United States. The statutes have been made to apply at various times to China, Japan, Siam, Egypt, Madagascar, Turkey, Persia, Tripoli, Tunis, Morocco, Muscat, and the Samoan Islands. They could be extended to any other country with which a treaty should be made. The first act was approved on August 11, 1848, and a more complete act was approved on July 20, 1860. Supplementary and amendatory acts were passed in 1866, 1870, 1874, and 1876. Taken together, they constitute the American statutes regulating extra-territoriality abroad, and are consolidated in Sections 4083–4130 of the Revised Statutes of the United States.

Consuls and commercial agents in regions not inhabited by civilized people, or not recognized by a treaty with the United States, may hear and determine civil cases where the obligations or damages are not more than one thousand dollars, and try cases of offenders where the fine does not exceed one hundred dollars, or the imprisonment sixty days. American ministers and consuls are, under the treaties, invested with judicial authority. This extends in civil matters to all controversies between citizens of the United States and others so far as the treaties provide, and in criminal matters to the trial and punishment of offenses committed by American citizens. The term "minister" signifies the person invested with principal diplomatic functions. The term "consul" indicates any person charged by the United States with the functions of Consul General, Vice-Consul General, Consul, or Vice-Consul. In case there is no minister accredited to one of the countries concerned, judicial duties fall to the Secretary of State. In civil cases the jurisdiction of the minister is appellate only; in criminal cases it is also appellate except in cases of insurrection, capital cases for murder, or for offenses amounting to a felony. If the consular officer is interested, either as party or as witness, the jurisdiction of the minister is original. The laws applied in both civil and criminal jurisdiction are: first, the laws of the United States; second, if the foregoing laws are deficient, or not suited, the common law and the law of equity and admiralty. If these are inappropriate and insufficient, there are applied, in the third place, decrees and regulations, having the force of law, which the ministers are empowered to make. In making such decrees and regulations the ministers are required to seek the advice of such consuls as can be consulted without serious delay or inconvenience; such consuls must submit their approval or disap-

proval in writing. The minister then publishes the decree or regulation along with the opinion of his advisors, and upon publication it becomes obligatory until revoked or modified by Congress. The minister is required as soon as possible after publication to send the papers to the Secretary of State, to be laid before Congress for revision.

The consul alone can decide cases where the fine does not exceed five hundred dollars or the term of imprisonment ninety days, and he *must* decide in cases where the fine does not exceed one hundred dollars or the imprisonment sixty days. Should legal questions complicate the case, or should the punishment exceed those specified above, he must summon to his aid one to four American citizens to sit as associates in the trial. In capital cases it must not be less than four. When any associate differs from the decision of the consul, the case must be referred to the minister. Capital cases for murder or insurrection against the government, or for offenses against the public peace amounting to a felony, may be tried by the minister. When tried by a consul, there can be no conviction except in the concurrence of the consul and of his associates, and of the approval of the minister. The consul sitting alone in civil cases may render judgments where damages do not exceed five hundred dollars. Where damages exceed this amount or where legal complications arise, citizens of the United States, if residing at the port, must sit with him as associates in the trial. Criminal cases may be appealed to the minister when one of the associates sitting with the consul differs from the consul's judgment, and where the consul sitting alone imposes a fine of more than one hundred dollars or imprisonment of more than sixty days. In civil cases an appeal may be taken to the minister when one of the associates differs from the consul.

Certain definite principles growing out of treaties, legislation, and practice have been established which regulate generally extra-territorial procedure. We will assume that China is a typical case. In the first place, where the controversy involves no foreigners, Chinese jurisdiction is complete, and Chinese law and procedure are applied. Again, where the controversies pertain to nationals of the United States, the jurisdiction is exclusively in the American extra-territorial courts. Where the controversy is between nationals of different states enjoying treaty privileges, the Chinese authorities exercise no jurisdiction and the states concerned regulate procedure under their own treaties. Where the controversy is between nationals of a treaty power and a non-treaty power, jurisdiction is in the authorities of the treaty power

if the case is brought by the citizen of a non-treaty power. The jurisdiction and the law applied are therefore usually determined by the nationality of the defendant.

On June 30, 1906, Congress passed a law entitled "An Act creating a United States Court and prescribing the jurisdiction thereof." The title of the court was to be "The United States Court for China." Its jurisdiction was to be exclusive in all cases, including judicial proceedings then exercised by the United States consuls, and ministers, under laws and by virtue of treaties between the United States and China, except that consuls in China were given the same jurisdiction they previously enjoyed in civil cases not involving more than five hundred dollars in money or property, and in criminal cases where the punishment for the offense did not exceed one hundred dollars fine or sixty days imprisonment, or both. Moreover, the consuls were given power to arrest, examine, and discharge accused persons or to commit them to the United States Court for China. The seat of the tribunal was fixed at Shanghai, but sessions were also fixed for the cities of Canton, Tientsin, and Hankow at stated periods of at least once a year. An appeal lay from the final judgments of the consular courts to the United States Court. This court was vested with supervisory control over the discharge by consuls and vice-consuls of their duties under the laws of the United States with respect to the estates of decedents. The procedure of the court was to conform with the rules of the consular courts in China, but the judge was authorized to modify and supplement the rules of procedure in case this should be required. In addition, there was provided a district attorney, a marshal, and a clerk of the court. The judge holds office for ten years, and he and the district attorney must be members of the bar in good standing and with considerable experience, and are appointed by the President by and with the advice and consent of the Senate. The legal machinery of the court is set in motion in all cases within its competence where the defendant is of American nationality. It has been settled by the Supreme Court of the United States that the constitutional guarantees provided for American citizens, such as indictment by a grand jury, and trial by a petit jury, cannot be claimed as a matter of right by defendants in the United States Court for China. This position is taken on the theory that the Constitution can have no operation in a foreign country.

At the Paris Peace Conference the Chinese delegation raised the question of extra-territoriality. It was pointed out, in the first place, that China had adopted a constitution providing for a separation of

governmental powers, assuring the people of the fundamental rights of liberty and property, guaranteeing a complete independence and protection of judicial officers, and the freedom of the courts from executive and legislative interference. She had prepared five codes (criminal, civil, commercial, civil procedure, and criminal procedure), some of which were already in force. A series of courts, including district courts, courts of appeal, and a Supreme Court at Peking, had been established. Civil and criminal trials had been separated, corporal punishments to coerce confessions had been abolished, and the publicity of trials had been provided for. Rules of evidence had been reformed and rules for the legal profession had been made. Examinations for attorneys were required. Officers of the courts were required to have legal training. The police and prison systems, it was advanced, had been improved. The Chinese delegation insisted that there were certain capital defects of the existing system in China. Inequality of rights and legal confusion had resulted from the fact that the consular courts of the several powers differed as to what constituted an opinion or a legal cause of action. It was difficult effectively to control witnesses or plaintiffs of nationals in other courts. When the crime had been committted far in the interior of China, it was difficult to obtain proper evidence. Finally, the conflict in the consular and judicial functions of the persons holding the courts further complicated the matter of justice. The delegation, therefore, requested that in all mixed cases where the defendant or accused was a Chinese, he should be tried in the Chinese courts exclusively and that the warrants issued or the judgments delivered by Chinese courts should be executed within the concessions or precincts of any building belonging to a foreigner without preliminary examination by any consular or foreign judicial officer.

The disadvantages of extra-territoriality to China were pointed out. The most telling argument was the claim of a complete derogation of the national sovereignty, and hence the humiliation of the Chinese. In civil and criminal cases, violations of Chinese laws and offenses against Chinese were tried in foreign tribunals and according to foreign laws. The system meant for the Chinese a multiplicity of foreign courts. It was claimed that even in their own courts the Chinese, in some cases, had to submit to the presence of foreign assessors. A certain bias was exercised by the courts in favor of their own nationals. Moreover, Chinese leaving Formosa, the United States, and the Philippines to China, or from Korea to Manchuria, asserted their technical foreign citizenship and, therefore, evaded the juris-

diction of China. It was further complained that the courts were presided over by officials who were not trained in the law. It was also contended that the system was disadvantageous to foreigners. There was an uncertainty as to which law might be applied. The courts exercised purely a personal jurisdiction over the persons of the defendants and there was no exclusive territorial jurisdiction. On these grounds the delegation sought relief in the direction of a gradual relinquishment of extra-territorial jurisdiction.

At the Washington Conference the desire of China to bring about the abolition of extra-territoriality was presented by Dr. Wang on November 25. He presented, in the main, the arguments advanced by the Chinese delegation at the Paris Peace Conference. A subcommittee on extra-territoriality was appointed to hear the Chinese case and to draft a resolution. On December 10, 1921, the resolution on extra-territoriality was adopted by the United States, Belgium, the British Empire, France, Italy, Japan, the Netherlands, and Portugal. It was agreed that the signatory powers should establish a commission to inquire into the practice of extra-territoriality in China, and into the laws and judicial system and administration of the country, with a view to finding the facts in regard to them and to recommending such changes as would improve the administration of justice. The commission was to be appointed within three months after the adjournment of the conference, and was to submit its report and recommendations within one year after the first meeting of the commission. The acceptance of the recommendations of the commission by any nation could not be conditioned upon the granting by China of any special concession, favor, benefit, and immunity, whether political or economic. In a supplementary resolution the Chinese Government expressed its satisfaction with the disposition of the governments to coöperate in the abolition of extra-territoriality in China, and agreed to appoint a representative to sit with the commission as a member on condition that it (China) might refuse or accept any or all of the recommendations of the commission.

The commission on extra-territoriality appointed in pursuance of resolution V of the Washington Conference was expected to meet at Peking on December 18, 1925. Delay in railway communications prevented its first meeting, and the Chinese cabinet changes delayed its sessions until January 14, 1926. Mr. Silas Strawn [2] was the Amer-

[2] Mr. Silas Strawn, the American member of the commission on extra-territoriality, made the following declaration on January 15, 1926, with respect to the policy of the United States: "Our extra-territorial rights were freely given

ican member of the commission, and also the Chairman of the Conference. The Chinese Minister of Justice declared in his opening address that China was the only independent nation of power where extra-territoriality existed. The extra-territorial régime, he pointed out, had outlived its usefulness and the Chinese Government had reformed its codes and courts in the hope that it might obtain the relinquishment of foreign jurisdictional control. Mr. Hioki, the Japanese commissioner, regarded the régime as a temporary expedient until improved conditions would justify its abrogation. The first business of the Conference was the study of Chinese law and judicial administration. Three powers—Japan, Great Britain, and the United States—have declared their willingness to go beyond the resolution of the Washington Conference, which authorized the commission only to inquire into the practices of extra-territoriality, the existing state of Chinese law, and judicial administration, and to report and recommend measures for improvement leading to a progressive and gradual relinquishment of extra-territorial rights. The Secretary of State, Mr. Kellogg, in his address of December 14, 1925, made the following statement in regard to the commission on extra-territoriality and Chinese conditions in general:

The Commission on Extra-territoriality, composed of commissioners, one from each of the Washington Treaty Powers and from such other Powers as adhere to the Washington Resolution, is to meet in Peking on the 18th of December. I have every hope that the aspirations of China to regain the control over her tariffs and to establish the jurisdiction of her courts over foreigners living within her borders will be worked out by the Conference with the assistance of the Commission on Extra-territoriality.

to us by China in the treaty of 1844 at a time when China was very glad to be relieved of the responsibility of administering justice among foreigners. That treaty was not the result of coercion or duress. Indeed the absurdity of the assertion that China was coerced into her extra-territorial treaties is apparent when we remember that China concluded an extra-territorial treaty with Switzerland as late as June, 1918. Certainly it cannot be said that China was coerced by the Swiss navy, there being no such thing.

"Our policy on the question of extra-territoriality is concisely put in the note of the Secretary of State from which I have quoted. More than 22 years ago our government expressed a desire to surrender those rights when the state of Chinese laws and the arrangements for their administration warranted such action. The purpose of the inquiry now being made by the Commissioners representing the foreign powers is to ascertain the facts about the state of the Chinese laws and the arrangements for their administration.

"There is no desire on the part of the United States to retain its extra-territorial rights in China a moment longer than the protection of the lives and property of its citizens seems to require. Were there a stable government in China, the problem would be easy of solution."

It must not be forgotten, however, that the tariff conventions and extra-territorial rights were not forced upon China for the purpose of extending foreign influence but were made by mutual agreement for the purposes of aiding commerce, protecting foreign citizens and settling long-standing, difficult questions between China and the other nations. I believe the time has passed when nations capable of maintaining self-government can be expected to permit foreign control and domination. Nevertheless one of the difficulties with which foreign countries have to deal in the case of China is the instability of its government and the constant warfare between various contending factions. China is a great nation; it has made wonderful progress and is now struggling to maintain a republic. In this she has the sympathy and good will of the American people and everything that we can legitimately do to aid her will be done.

The Commission on Extra-territoriality completed and signed its report in September, 1926. Part I of the report deals with the practice of extra-territoriality as it now obtains in China, taking up the defects of the machinery and its injustices, as charged by the Chinese. Part II relates to the laws and the prison and judicial systems in China. Many of the laws applied were found to be in the form of decrees, without constitutional foundation. The clauses on the prison and judicial systems were findings of fact. Part III dealt with the administration of justice in China. Here the lack of a controlling central government has impaired administration. Legislation, left to the Parliament, has not been passed. Military leaders may, within the region of their power, exercise all functions of government without stint, thus causing the judiciary to lose its special character. The depleted treasury has prevented the financing of improvements, and the maintenance of courts. The rival courts set up by contending governments, the judgments and authority of which are not recognized by the central government, complicate the situation. Part IV deals with recommendations which, when adopted or complied with, the powers would be warranted in relinquishing their extra-territorial rights. These recommendations were, in general: (1) that the Chinese judiciary should be protected from the encroachments of other branches of government; (2) that the Chinese should adopt the suggested program for the improvement of her existing legal, judicial, and prison systems; (3) that, pending the total abolition of extra-territoriality, progressive stages of abolition by territory or jurisdiction might be followed; (4) that the powers should modify their existing systems and practices along certain suggested lines to improve the administration of justice and to remove certain injustices to the Chinese.

The failure to obtain these concessions has made the present nationalist movement in China more formidable, but has not taught them the lesson of unity in international action. The allied powers were prepared to proceed even faster than the Washington arrangements had contemplated. The arguments of the Chinese that these conditions impaired her sovereignty, hurt her dignity, impoverished the country, and discouraged unity and stability had been made at Versailles and at Washington. They had become an old song to the powers, and they were at last prepared to see what China proposed to do in a positive way toward assuring that adequate administration of justice would be established, and that provincial tariffs would not be levied. They will not relinquish their rights until certain guarantees are given. But an anti-foreign movement has set in from all sides, which blames the foreigner and exonerates the Chinese. This is hardly a considered judgment as to the location of responsibility. They blame the foreigners, not only for failures to relinquish judicial and customs control. Each faction seeking recognition blames each government for not so preferring it. Each faction blames the powers for not being able to deal with irresponsible plenipotentiaries. Moreover, each group blames the powers for taking positive steps to protect the lives and property of their citizens during an unreasonable anti-foreign movement when the factions are not only fighting each other, but persecuting the foreign residents. And the charge of foreign imperialism is made on every hand.

The policy of the United States as regards China was set forth by Secretary of State Kellogg in a statement issued January 26, 1927. He sketched briefly the policy of the United States with respect to China following the Washington conference, and pointed out how the United States had urged the customs agreements and the extra-territorial investigation far in advance of the legal arrangements. The American representatives had approached both of these questions in a liberal spirit favorable to the Chinese. The government is still ready to proceed with its negotiations on both questions when China is ready to do so with some opportunity of concluding responsible and reliable arrangements. But with whom shall the government negotiate? The old treaties cannot be merely abrogated by the President; they must be superseded by new treaties "negotiated with somebody representing China and subsequently ratified by the Senate of the United States." During the revolutionary movement, the United States has followed a policy of neutrality. If the Chinese authorities are unable to protect American life and property, it is the funda-

mental duty of the United States to do so which the people of China and their leaders should recognize. He answered the charge of imperialism as follows:

> This Government wishes to deal with China in a most liberal spirit. It holds no concessions in China and has never manifested any imperialistic attitude toward that country. It desires, however, that its citizens be given equal opportunity with the citizens of the other powers to reside in China and to pursue their legitimate occupations without special privileges, monopolies or spheres of interest or influence.

The American Treaty of Lausanne.—On August 6, 1923, the United States and Turkey entered into a treaty at Lausanne which regulated the conditions of intercourse and residence of their nationals within their respective territories and provided for the resumption of relations in accordance with the principles of international law and on the basis of reciprocity. At the same time there was concluded the general treaty of Lausanne between the Allies, on one hand, and the Turks, on the other. It should be remembered that in China extra-territoriality rests upon treaties with the western powers, whereas in Turkey it rested upon ancient customs as well as upon treaties or capitulations. This explains why certain practices obtained in Turkey which are not based upon treaties and which find no place in the system of extra-territoriality as it now exists in China and as it once existed in Japan. Under this system the citizens of non-treaty powers and natives of Turkey could claim the protection and the good offices of the consuls of the treaty powers. This, according to John Bassett Moore, was not by the mere exercise of good offices, but by the "assimilation of the persons protected to the nationality of the protector." By the terms of the general treaty of Lausanne, between the Allied Powers and Turkey, foreigners living in Turkey are now subject to Turkish laws. The capitulations which extend back to early times, granting judicial privileges to foreign nations, have been entirely abolished. When Turkey entered the World War, she announced in September, 1914, the abolition of the capitulations. The Allied Powers and the United States (then a neutral) regarded this action by Turkey as illegal because of its purely unilateral character. The Sublime Porte announced that these rules, formerly extended to foreigners and continued under the name of capitulations, had come to be regarded as privileges. They were inconsistent with the judicial rules of the century and with the principle of state sovereignty, and were prejudicial to the Empire.

The affected powers protested against this act. The government of the United States refused to acquiesce in the announcement of the Ottoman government that the capitulations were abrogated; nor would the United States recognize the right of Turkey to take this unilateral action. American rights in Turkey were first regulated by a treaty of commerce and navigation concluded in 1830, which provided in part that civil cases between Americans and Turks should be decided by the Turkish authorities only when an American dragoman was present, and that Americans accused of penal offenses could not be apprehended by Turkish authorities, but would have to be tried by the American minister or consul. It was further stipulated that American officials could not protect the Christian subjects of Turkey. Other treaties confirmed this right. The United States remained in a technical state of peace with Turkey during the war. On April 20, 1917, Turkey suspended diplomatic relations with the United States and announced the suspension of all treaties with that government. The American Government protested this attempted suspension and gave the protection of its interests to the government of Sweden. Diplomatic and consular officials were withdrawn. The treaty of Sèvres concluded the war between the Allies and Turkey. It aimed at the dismemberment of the Turkish dominions and the virtual exclusion of Turkey from Europe. This treaty was rewritten by the general treaty of Lausanne. At the conference of Lausanne, which met on November 20, 1922, the United States was represented by Mr. Child, its ambassador to Italy, Admiral Bristol, its high commissioner to Constantinople, and Mr. Grew, its minister to Switzerland. Mr. Child pointed out that the United States was represented at Lausanne for three purposes: first, to protect American interests, idealist or commercial, humane or financial, without discrimination; second, to protect, whenever possible, humanitarian interests regardless of nationality; and third, to serve in all appropriate ways the cause of peace. He declared that the United States was in favor of the Open Door in the East, and in favor of the freedom of the straits and of the Black Sea, because such a program was for the good of all.

It became necessary for the United States to define its relations with Turkey. It was agreed that this should be done by negotiating separate treaties rather than by adhering to the general conventions. On August 6, 1923, two treaties were signed; one was an extradition treaty which replaced previous treaties of the same kind, and the second, commonly called the "American Treaty of Lausanne," regulated the general relations between the United States and Turkey.

Under the treaty, the parties agreed that capitulations in Turkey should be completely abrogated. In regard to questions of personal status, domestic relations, and personal succession, formerly under the jurisdiction of American consular tribunals, American citizens in Turkey were to remain subject to the jurisdiction of American tribunals or to authorities outside of Turkey. American citizens were entitled to the benefits of the new régime of administering justice in Turkey. American philanthropic, educational, and religious institutions recognized prior to the war would receive continued recognition, and more recent institutions would be regularized. The full rights of the citizens of one country resident or sojourning in the other, who were admitted under the immigration laws of the respective states, were accorded. Exemption from military service and from contributions in lieu thereof were guaranteed for the nationals of each country. Most-favored-nation treatment was assured in matters of commerce and navigation. The important provision of the American treaty of Lausanne is the abolition of extra-territoriality and the capitulations. The Democratic members of the Senate Committee on Foreign Relations, under the leadership of Senator Robinson of Arkansas, have opposed the ratification of the measure. The Democratic platform of 1924 also contained a plank against its ratification.[3] This minority opposition continues on the ground that the United States is not ready to relinquish the control of its citizens, insofar as the administration of justice is concerned, to a country of Turkey's grade of civilization. The explanation of the official American point of view was made by Secretary of State Hughes in a speech delivered in New York on January 23, 1924: "If such a treaty," he said, "falls short of expectations, especially in that it acquiesces in the abrogation of the capitulations, it should not be forgotten that the only way to maintain the capitulations was to fight for them. It should also be borne in mind (1) that the Lausanne treaty is such a treaty as would be negotiated with any other foreign state, (2) that it gives us the same rights as other countries will enjoy under the new régime, and (3) that by regularizing our relations with Turkey, now interrupted for nearly seven years, it will provide safeguards for American education, philanthropic, and commercial interests."

The American Treaty of Lausanne has been definitely rejected by the United States Senate.

[3] This plank reads: "We condemn the Lausanne treaty. It barters legitimate American rights and betrays Armenia, for the Chester oil concessions. We favor the protection of American rights in Turkey and the fulfillment of President Wilson's arbitral award respecting Armenia."

The Washington Conference: China.—On August 11, 1921, the Government of the United States invited certain powers to participate in a conference on the limitation of armament, in connection with which Pacific and Far Eastern questions would also be discussed. Except for the question of the limitation of armament and the maintenance of the peace of the Pacific, it was essentially a China conference.[4]

[4] It has often been suggested that any number of conferences with respect to China, and the greatest possible solicitude for her condition will avail nothing, unless some of the effort to remove the cause for her many disabilities comes from within, in the form of definitely organized activity rather than through the mere expression of hope. Mr. Silas H. Strawn, American representative at the Customs and Extra-territoriality Conferences held at Peking, 1925–1926, expressed his views to some students in China on January 15, 1926, in the following significant terms:

"We hear much about China being the victim of unequal treaties; that she is being ground under the heel of imperialism; that her people are suffering from the injustices of extra-territorial rights, and that her sovereign dignity is being continuously impinged. Since I have been in China it has been my duty to study the economic, political, and social conditions obtaining here, and while it may be absurd for me to assert that I could accurately diagnose all of these conditions, I believe I can confidently state that I have seen thus far no convincing evidence that China's present day troubles are in any degree attributable to the so-called unequal treaties, or to the imperialistic attitude of the foreign powers.

"On the contrary, the evidence seems to be overwhelming that the troubles of China today are internal rather than external, and that unequal treaties, extra-territoriality, tariff autonomy and imperialism are political slogans which are availed of by the agitators to excite the people of China into a frenzy of criticism and unrest. I cannot take the time to go into the various reasons for the assertions I have made, but I ask you, as careful students of Chinese history, and as young men who have the welfare of China uppermost in your hearts, not to be led astray by propaganda or political slogans, but that each of you sit down calmly and carefully and study the facts about present conditions in China before you come to a conclusion as to the cause. . . .

"The people of China cannot accumulate anything for tomorrow's needs because the margin between what they create and what they consume is continuously exhausted and dissipated in futile and purposeless wars. Wars carried on, not to establish any principle, not against a common enemy assailing the integrity of the country, but for the sole purpose of satisfying the ambitions of the warlords for greed and aggrandizement. . . .

"Finally, my young friends, I repeat, the trouble with China is internal, not external. Too much war and too many taxes of all kinds to pay for war. The other nations are willing to let China raise her tariff just as high as her needs seem to require. They have already signified their willingness that China shall enjoy tariff autonomy on January 1, 1929, exactly as proposed by the Chinese delegation. The solicitude of other nations is that the tariff shall not be so high as to produce no revenue and that the revenue thus produced shall not be dissipated by the warlords in futile and sanguinary wars.

"The foreign nations wish that the Chinese people shall receive the benefit of the revenues they create to the end that a new China may be born and the Chinese people may become comfortable and independent, if not indeed prosperous and rich."

It was prepared to discuss the dangers which threatened China and the dangers of Japan. The agenda adopted by the conference for the discussion of Pacific and Far Eastern questions embraced, in the first place, questions relating to China. The principles to be applied were to be determined, and their application was then to be discussed under the following headings: territorial integrity, administrative integrity, Open Door—equality of commercial and industrial opportunity, concessions, monopolies, or preferential economic privileges, the development of railways, including plans related to the Chinese eastern railway, preferential railroad rates, and the status of existing commitments. Questions related to Siberia and mandated islands were also to be discussed. China, on her part, presented ten points which she urged for adoption upon the conference. They were in brief: (1) that the powers engage to respect and observe the territorial integrity and the political and administrative independence of the Chinese Republic; (2) that China, in keeping with the principle of the Open Door or equal opportunity in commerce and industry of all nations having treaty relations with China, is prepared to apply it without exception to all parts of the Republic; (3) that the powers agree not to conclude between themselves any agreements affecting China or the Pacific region without previously notifying China and giving her an opportunity to participate; (4) that all special rights, privileges, immunities, or commitments of whatever character claimed by any of the powers in regard to China, and all such future claims, be declared null and void; (5) that as soon as possible existing limitations upon Chinese political, jurisdictional, and administrative freedom of action be removed; (6) that definite time-limits be attached to such Chinese commitments as did not have them; (7) that instruments granting special rights be construed strictly in favor of the grantor; (8) that the Chinese neutral position be fully respected in wars to which she is not a party; (9) that provision be made for the peaceful settlement of international disputes in the Pacific and the Far East; (10) and that continuation conferences be held from time to time for the discussion of international questions relating to the Pacific and Far East.

There was a considerable difference between the program for which China asked and the realization. On the whole, however, the position of China, both as a sovereign state and as a member of the family of nations, was immeasurably advanced. The first question to which the conference gave its attention was the protection of Chinese integrity. A troublesome question was that of defining the territories of the

Chinese Republic. Dr. Koo of the Chinese delegation pointed out that insofar as territorial integrity was concerned, the principle should be applied to all Chinese territories as a unit. From the standpoint of administrative integrity, there was some difference in the status of administration in the different parts of China. So far as the world was concerned, Dr. Koo insisted that the Chinese Republic as a unit be considered from the standpoint of its territorial and administrative integrity. The most forward step was taken by Mr. Elihu Root, one of the American representatives, who introduced the following resolutions:

It is the firm intention of the powers attending this conference hereinafter mentioned to wit, the United States of America, Belgium, the British Empire, France, Italy, Japan, the Netherlands, and Portugal:

1. To respect the sovereignty, the independence and the territorial and administrative integrity of China.

2. To provide the fullest and most unembarrassed opportunity to China to develop and maintain for herself an effective and stable government.

3. To use their influence for the purpose of effectively establishing and maintaining the principle of equal opportunity for the commerce and industry of all nations throughout the territory of China.

4. To refrain from taking advantage of the present conditions in China, in order to seek special rights or privileges which would abridge the rights of the subjects or citizens of friendly states and from countenancing action inimical to the security of such states.

It is seen that the terms used in the first resolution refer to the attributes of an independent state in the family of nations. Sovereignty means in international law the possession by a state of supreme will or supreme power. It implies, according to Chief Justice Marshall, a jurisdiction which is necessarily exclusive and absolute, and which is susceptible of no limitation not imposed by itself. Any restriction upon such jurisdiction would imply a diminution of sovereignty. The authority of a sovereign state can not be limited without its own consent. There are states of limited sovereignty in international law; the theory is, however, that such limitations have been fully agreed upon. Independence is an idea somewhat akin to sovereignty. Unlike sovereignty, it is an absolute quality and is not partible. That state is independent which retains unimpaired and undiminished its supreme will. It may concede certain sovereign rights to another state, but the power which gives is also a power which can take away. Territorial integrity implies, in the first place, that the territory belonging to a

state under international law cannot be taken from it without its consent; in the second place, that it has a definite relation to sovereignty or jurisdiction. It is a maxim of international law that territory and jurisdiction are co-extensive. A state maintains its territorial integrity, therefore, which forbids the exercise of jurisdiction by another power within its borders. Administrative integrity differs from territorial integrity. It may refer either to the operations of the executive part of a government or to all governmental operations having to do with the conduct of affairs. A state maintaining its administrative integrity is one which does not permit the exercise of acts of government properly belonging to itself within its own jurisdiction. A number of concessions under this head have been made by China to the foreign powers, such as extra-territoriality, leased areas, the maintenance of police boxes and foreign troops, the control of postal services, spheres of interest, and the control of tariffs.

On February 6, 1922, the United States, Belgium, the British Empire, China, France, Italy, Japan, the Netherlands, and Portugal entered into a treaty relating to the principles and policies to be followed in matters concerning China. Article I reproduced the provisions of the Root resolutions expressed above. China had already agreed not to lease or alienate any portion of her territory or littoral to any power. The parties under this treaty engaged further not to enter into any treaty or understanding among themselves, or with any other power, which would infringe upon the principles of Article I. In carrying out the principle of the Open Door, the parties other than China agreed not to support their respective nationals who sought advantages which would impair it, while China agreed not to grant such advantages to the nationals of other powers. The parties agreed not to support any arrangements between their respective nationals which would have the effect of creating spheres of influence in Chinese territory. Under Article V, China agreed not to exercise or allow unfair discrimination on railways in her territory. The parties undertook the same obligation with respect to railways over which they exercised any control. In the event of a war to which China was not a party, the parties other than China agreed to respect her rights as a neutral, whereas China, on her part, agreed to observe the obligations of neutrality. Should, in the opinion of any of them, any situation arise involving the application of a treaty, there should be a full and frank communication between the contracting parties. A resolution respecting radio stations in China was passed on February 1, 1922, whereby the use of ambassadors' stations was limited to

diplomatic purposes. Stations within concessions were limited to special uses of the concessionaire, while unauthorized stations were to be surrendered to China. The Chinese delegation refused to recognize or concede the right of any power or its nationals to operate or install without its consent radio stations in legation grounds, settlements, concessions, leased territories, railway areas, or other similar areas. On the same day a resolution was passed respecting the reduction of Chinese military forces. The hope was expressed that steps would be taken forthwith to reduce Chinese military forces and expenditures.

Still another resolution dealt with the existing commitments with respect to China. The powers agreed to file with the secretariat-general of the conference two lists of documents, each containing either a citation of a published text or a copy of the text itself. The first list would show all the international agreements of the power with China or with powers in relation to China; and the second list would show all contracts between nationals of that power and the Chinese Government or local authorities. Future treaties and contracts should be declared within sixty days by the government concerned to other signatories. China undertook the same obligations. This was an attempt to strike a deathblow at secret diplomacy in the East. Other measures of control were in a sense limited by the conference. The question of foreign troops in China was fully discussed. The powers admitted that foreign troops, including police, had been stationed in China in some cases without authority of treaty or agreement to protect the lives and property of foreigners lawfully in China. The resolution provided that the diplomatic representatives of the powers party to the conference accredited to Peking should, upon the request of China, conduct a full and impartial inquiry into the question and make a report to the interested powers. Three Chinese representatives should be associated with the diplomatic representatives at Peking for the investigation. The Chinese delegation offered its cooperation in facilitating the inquiry and expressed the hope that this derogation of its sovereignty might soon be brought to an end. The question of foreign post offices was considered by the conference, and it was finally arranged that the powers maintaining foreign postal agencies in China should agree to their abandonment on condition that China should maintain an efficient postal service and that there should be no immediate changes in the postal administration insofar as foreign officials were concerned.

One of the most pressing questions had to do with leased areas. These subjects were discussed between China and the grantees, rather

than before the entire conference. Kowloon, Mr. Balfour declared, occupied a unique and unparalleled position in the world's trade. Contending that the lease of Kowloon had been obtained only to give security to the port of Hongkong, he insisted that it was within a different category and should be dealt with in a different spirit from the other leased territories. In regard to Wei-hai-wei, Mr. Balfour declared that the British Government would undertake to surrender this district to China in case an agreement could be reached between Japan and China in regard to Shantung. Kwanghow-wan was under lease to France. The French delegation declared that France was ready to surrender her lease when the other powers were ready to surrender their respective leases. One of the most difficult of problems was that of Shantung. This province had been taken by Germany in 1898 in compensation for certain indignities committed by the Chinese against some German missionaries. After the outbreak of the Great War, Japan seized Shantung and declared that she had succeeded to the rights and interests of Germany. In 1915 she compelled China to agree to this succession as a part of the famous "twenty-one demands" of that year. During the war the Allied Powers (Great Britain, France, and Italy) by secret treaties guaranteed Shantung to Japan. The United States, under the Lansing-Ishii agreement of 1917, recognized the special interests of Japan in China by reason of propinquity. At the Paris Peace Conference the Shantung question was in the foreground. President Wilson was confronted with the secret treaties of the powers, until then unknown to him, confirming Japan's title to Shantung. It was at length agreed in the Treaty of Versailles that the province should pass to Japanese hands. In the Senate campaign concerning the ratification of the treaty of peace, no question loomed larger than that of Shantung. Mr. Wilson made the point that "it was taken not from China but from Germany." In answer to his critics, he put the telling question: "Would you go to war with Japan to prevent her succession to German rights in Shantung?" At the Washington Conference it was agreed that the Shantung question should form the subject of conversations between Japan and China. The interested parties agreed to the release of Shantung to China by gradual stages and under specific conditions. The famous "twenty-one demands" of May 25, 1915, were brought before the conference by the Chinese delegation. The Japanese delegation refused either to consider the cancellation of these treaties and agreements, or to admit any doubt as to their legality. The wholesale cancellation of the demands was refused, but China substantially won her point in various

but definite ways. The Lansing-Ishii agreement of November 2, 1917, was terminated by an exchange of notes between the American and Japanese governments in April, 1923.

The questions of extra-territoriality and customs autonomy discussed at the Washington Conference are treated under other headings.

The Washington Conference: The Peace of the Pacific.—Fully as important as the integrity of China is the peace of the Pacific. The necessity of preserving this led to the Four Power Treaty of December 13, 1921, the conclusion of which was largely due to coöperation between Great Britain and the United States. The relations between these countries were somewhat affected by the Anglo-Japanese alliance contracted in 1902 and renewed on July 13, 1911. The Four Power Treaty of Washington displaced the Anglo-Japanese alliance. Some writers contend that it is simply the old alliance plus France and the United States; more correctly, however, it is an agreement between Great Britain and the United States without excluding Japan and with the addition of France. The Anglo-Japanese alliance was especially objectionable to the United States. It was at first a defensive measure against the policies of Russia and Germany in the Far East, and as such it did not conflict with American policies in that region. But after 1914 the situation had changed. Russia and Germany were no longer effective Far Eastern powers. Japan had greatly strengthened her position in that region and had become very aggressive. The policies of Japan and the United States seemed to be leading directly to conflict insofar as China and the Pacific were concerned. What would be the attitude of Great Britain in such an event? Manifestly, British and American interests in this region were close, and in some cases even identical, yet England was bound to Japan by a strong alliance. The only remedy was to agree upon a set of principles for the peace of the Pacific which would be acceptable both to Japan and to Great Britain, and in which the United States and France could heartily concur. The text of the treaty is brief but most significant. The United States, Great Britain, France, and Japan established a form of coöperation with respect to their insular possessions and dominions in the Pacific region. Should any controversy arise between any of the parties in regard to a Pacific question which cannot be settled diplomatically as regards their rights in relation to these possessions and dominions, they agree to invite the other parties to the treaty to a joint conference to consider and adjust the whole subject. When the rights safeguarded by the treaty are threatened by another

power, the parties agree to communicate fully and frankly with each other in order to reach an understanding as to the best measures to take, jointly or separately, to deal with the situation. The United States Senate in ratifying the treaty declared that it should not be regarded as a commitment to an alliance, to armed force, or to an obligation to join in any defense. In discussing this treaty, Mr. Hughes declared, "Thus, we have definitely adopted a policy for the protection of our insular possessions and for the preservation of peace in the Pacific region, of conference and consultation with other powers." A supplementary treaty was signed which excluded the archipelago of Japan proper from the guarantee of the Four Power Treaty.

In pursuance of this policy of peace in the Pacific the United States made agreements with respect to the limitation of fortifications and naval bases in the Pacific Ocean. For a period of fifteen years (until the end of the year 1936) it engaged to maintain the *status quo* as regards fortifications and naval bases in the Philippines and Guam. In the course of the Senate debates on the naval treaty Senator Lodge declared that we took Guam in the Spanish-American War, that we had never fortified it, and that nobody would vote to spend money in fortifying it. In fact, we had passed no law concerning it at all. As regards the Philippines, he declared that they would never be fortified. It would cost hundreds of millions of dollars to fortify them, and the United States would never agree to it.

Japanese Immigration.—The original anti-Chinese movement in California has its counterpart in the anti-Japanese agitation which culminated in the immigration law of 1924. The agitation first took definite form in 1900. At public meetings in California the demand was made that the Japanese be excluded from the United States in the same manner as the Chinese. Exclusion bills were introduced in Congress but were opposed by President Roosevelt. In 1906 the San Francisco School Board required all Japanese children to attend the so-called Oriental School in the Chinese quarters of the city. After a strenuous protest on the part of Japan, both Secretary of State Root and President Roosevelt strongly opposed the measure as a violation of the treaty. The School Board finally reversed its position. By the immigration act of 1907 President Roosevelt was authorized to refuse admission to immigrants who used passports issued in the first instance to any country other than the United States. Skilled and unskilled Japanese or Korean laborers receiving passports for Mexico, Canada, or Hawaii were refused admission into the continental United States. The act also authorized the President to enter into in-

ternational agreements for the prevention of immigration of aliens who might, under the laws of the United States, be excluded therefrom. President Roosevelt therefore entered into the celebrated Gentleman's Agreement, which placed the control of Japanese immigration in the hands of the Japanese Government. It merely provided that Japan should not issue passports to laborers, skilled or unskilled, desiring to enter the continental United States, unless they contemplated the resumption of a formerly acquired domicile, or unless they were the parents, wives, or the children under twenty years of age, of laborers in the United States. The treaty of February 21, 1911, between the United States and Japan provided that the citizens or subjects of each of the powers should have the liberty to enter, travel, or reside in the territories of the other, to carry on trade, wholesale or retail, to own, lease, or occupy houses, manufactories, or warehouses, to employ agents of their own choice, to lease land for residential and commercial purposes, and generally to do anything incidental or necessary for trade upon the same terms as native citizens or subjects who submitted to the laws and regulations. This treaty was approved by the Senate, subject to the understanding that it would not constitute a repeal of the provisions of the immigration act of 1907.

Agitation on the Pacific Coast was again directed against the Japanese, and especially against the Gentleman's Agreement. Under the revised statutes of the United States, naturalization is open only to free white persons and to persons of African nativity or of African descent. The Supreme Court of the United States has expressly held that Japanese are not eligible to citizenship through process of naturalization. In 1913 California passed a law forbidding aliens ineligible to citizenship from purchasing property for agricultural purposes, though allowing them to lease land for three years without the right of renewal. In 1920 such aliens were forbidden to own or lease real property except as guaranteed by treaty rights. Similar laws were passed by a number of the state legislatures. A report was compiled by the California State Board of Control and sent to the Secretary of State pointing out the main points of complaint of California against Oriental peoples. This embraced sections on population, birth-rate, land, sanitation, the fishing industry, labor, corporations, picture brides, the Gentleman's Agreement, smuggling, citizenship, and schools. The House Committee on Immigration conducted an investigation of the Oriental situation in California and rendered its report on March 24, 1924. This committee reported a bill which provided that no alien ineligible to citizenship should be admitted to the

United States unless he came within certain privileged classes. The House adopted the measure by a vote of 323 to 71.

Ambassador Hanihara protested vigorously against the enactment of this measure, referring to the Japanese as a proud people and to the Gentleman's Agreement as an instrument faithfully discharged by the Japanese Government. In closing, he made the following statement: "Relying upon the confidence you have been good enough to show me at all times, I have stated or rather repeated all this to you very candidly and in a most friendly spirit, for I realize, as I believe you do, the grave consequences which the enactment of the measure retaining that particular provision would inevitably bring upon the otherwise happy and mutually advantageous relations between our two countries." This letter, written to Secretary Hughes on April 10, was published in the Congressional Record for April 14. Senator Lodge suggested that the Senate go into executive session. He regarded the letter of Hanihara as improper and containing a veiled threat against the United States, and declared that the Japanese ambassador had created a situation which made it impossible for him to support the amendment which would have the effect of restoring the Japanese to the quota basis as was the case of all other nations. He said: "The amendment has now assumed the dignity of a precedent which will give any nation the right to think they can stop by threats or compliments the action of the United States when it determines who shall come within its gates and become part of its citizenship." On April 17 Mr. Hanihara, in a letter to Secretary Hughes, explained his use of the term "grave consequences," and pointed out that he did not mean anything disagreeable or discourteous, and still less did he wish to convey the idea of a veiled threat. The measure was passed by the Senate on April 18 by a vote of 62 to 6, and was referred to a conference committee to iron out the differences between the House and Senate versions. Both the President and the Secretary of State had urged that the quota principle be applied to the Japanese, as it was applied to every other nation affected by the act. After considerable negotiation the bill passed the House of Representatives on May 15 by a vote of 308 to 62, and passed the Senate by a vote of 69 to 9. The immigration bill, including the exclusion of aliens ineligible to citizenship, was then sent to the President, who signed it on May 26, 1924. In his statement explaining his signature of the bill, he regretted the impossibility of severing from it the exclusion provision affecting especially the Japanese. He expressed admiration for the Japanese people, and pointed out that if the exclusion pro-

vision had stood alone he would have disapproved it without hesitation. However, he was compelled to consider the bill as a whole and to take into account the imperative need of the country for legislation of this general character. Hence the bill was approved. In general, the quota principle is applied to immigrants from most nations. However, aliens ineligible to citizenship, whether laborers or not, are excluded unless they belong to one of the following privileged classes:

1. Government employees.
2. Merchants and tourists, temporarily sojourning in this country.
3. Immigrants returning from a sojourn abroad.
4. Bona fide ministers and professors, and their wives and children under eighteen.
5. Bona fide students at least fifteen years of age.

The law called forth much dissatisfaction in Japan. The press of that country was especially unfavorable, and resolutions were passed by numerous bodies, official and unofficial, against this action on the part of the Congress of the United States. Some opinion in the United States was also strongly opposed to this measure, many prominent citizens having expressed their disapproval of it. An active minority is now seeking a reconsideration of the exclusion feature of the immigration law of 1924. The fact remains, however, that the bill was passed by a fair majority in both houses of the Congress, and that the President did not see fit to risk the danger of a veto. In view of its wide popular support and approval, the representations of a few distinguished men and bodies will unlikely have the effect of compelling a change in the law.

Foreign Loans to China.—The Chinese Government, through voluntary loans and through heavy war and indemnity debts, had become obligated to a number of foreign creditors, including governments and individuals. In 1911 a currency loan was negotiated by the Chinese finance minister with French, German, British, and American banking interests, which provided a five per cent sinking fund gold loan of ten million pounds, of which eight and one-half million pounds was to be devoted to the reform of China's currency. The Russian and the Japanese governments requested that, in the future, their banking houses be allowed to participate in loans to China. This led to the Six Power Agreement or Consortium of June 18, 1912, between Great Britain, France, Germany, Russia, Japan, and the United States. Private banking concerns in each country had become interested in floating Chinese loans in their own money markets, and a certain dip-

lomatic support had been assured these firms by their respective governments in carrying on business with China. The national banking groups so recognized had agreed with corresponding groups to pool financial openings in China and to share in proportions which might be agreed upon. Moreover, the governments had themselves approved the agreement between the national groups. It involved the two seemingly opposed principles of coöperation and monopoly. The American banks withdrew from the consortium on the ground that its policy was inconsistent with the principle of the Open Door. President Wilson, in announcing the withdrawal of the United States, made the following explanation:

> The conditions of the loan seem to us to touch very nearly the administrative independence of China itself, and this administration does not feel that it ought, even by implication, to be a party to those conditions. The responsibility on its part which would be implied in requesting the bankers to undertake the loan might conceivably go to the length in some contingency of forcible interference in the financial, and even the political affairs of that great oriental state, just now awakening to a consciousness of its power and its obligations to its people. The conditions include not only the pledging of particular taxes, some of them anticipated and burdensome, to secure the loan, but also the administration of those taxes by foreign agents. The responsibility on the part of our government implied in the encouragement of a loan thus secured and administered is plain enough and is obnoxious to the principles upon which the government of our people rests.

The outbreak of the World War brought the consortium to an end so far as active work was concerned. Japan enjoyed a complete monopoly of investment in China. On July 8, 1918, some American bankers, at the suggestion of the Department of State, proposed that a Four Power Consortium be formed to include the United States, Great Britain, Japan, and France. This was approved by the Department of State with the understanding that the American Government would object to any loan the terms or conditions of which might impair or tend to impair the political control of China or the sovereign rights of the Chinese Republic. The British Government welcomed the proposal in general, but sought further light on the subject. It was suggested by Great Britain that all interested firms of good standing be invited to join the respective groups. The United States, on February 24, 1919, suggested that the four groups enter into negotiations upon receiving the approval of their governments. The groups held a meeting in Paris on May 11 and 12, 1919, and submitted a draft of an

agreement to the governments. The British and French Governments opposed the general pledge of exclusive diplomatic support of the respective governments. There was substituted the provision that the several governments should pledge their complete support to their respective groups in their financial obligations, and that they should give their collective support to the consortium in the case of competition for loans. On June 18, 1919, the Japanese group demanded that the rights and options held by Japan in Manchuria and Mongolia, where Japan had special interests, should be excluded from pooling arrangements provided for in the proposed agreement. Both Great Britain and the United States objected to this exclusion. But Japan remained obdurate. Instead of excluding specific areas from the activities of the consortium, Great Britain and the United States gave formal assurance that the consortium would not attempt obligations which would prejudice the economic life and national defense of Japan, and that the other three governments would not permit any such obligations. The Japanese Government accepted these assurances in lieu of their demand for exclusion. The final arrangement was signed by the four groups in New York on October 15, 1920. Little progress has been made in financing China through the consortium. Political conditions have been revolutionary and the opinion of the Chinese Government and people has been somewhat hostile to foreign interests. The consortium, following a policy of abundant caution, has done little to achieve its end. A political contingency has intervened to upset the most sanguine expectations.

The Chinese Customs Conference.—A treaty relating to the Chinese customs tariff was signed at the Washington Conference by the nine powers on February 6, 1922. The fact that the regulation of tariffs is regarded as a domestic concern seems inconsistent with the treaty of the Washington Conference and other treaties concerning it. The Chinese maritime customs administration was under the direction of foreigners in the service of China. It was the result of agreements between the central government of China and the consular body at Shanghai. While a seemingly obnoxious form of foreign control, yet it assured the foreigner of stable conditions for carrying on his business, and made the Chinese Government the recipient of an assured revenue. This was the one certain revenue flowing into the national government which was not diverted to provincial uses. There should be, therefore, for the benefit of both China and the foreigners, no serious dislocation of the administration of Chinese maritime customs. The Chinese customs rate was fixed by a convention at 5 per cent ad

valorem on both exports and imports since the Anglo-Chinese commercial treaty of 1843. Specific duties on a number of articles had been revised through the treaty agreements in succeeding years. In a number of treaties China had given special privileges to foreign states. China was, therefore, committed by treaty to certain specific charges based on a maximum rate of duty. Certain of the powers had agreed to a relaxation of their foreign tariff control in case China would abolish all *likin* or the provincial customs charges exacted by provincial governors. The powers, however, were not willing to give up their treaty rights as long as there was no effective political control within the Chinese Republic. At the Washington Conference the Chinese argued strenuously against a continuance of foreign customs control. In the first place, they declared, it was an infringement on their sovereignty; in the second place, it deprived China of her power to enter into reciprocity agreements with other nations, which was a powerful economic weapon in the hands of most nations; in the third place, it was a serious loss to the Chinese treasury; and in the fourth place, the treaties prevented the government from differentiating between luxuries and necessities and making appropriate taxes therefor. After considerable discussion the customs treaty was finally adopted. It provided for the immediate holding of a tariff revision conference at Shanghai which would bring the specific tariff up to 5 per cent. A special conference should be called to abolish internal customs (*likin*) and to provide for the fulfilment of the conditions of the commercial treaties of 1902 and 1903. These treaties would increase the customs duties at the frontier to 12½ per cent. The special conference was authorized to agree to a surtax of 2½ per cent amounting to 5 per cent in the case of luxuries if the conference so decided. The conference was also to discuss the disposition of the additional revenue. The customs schedule was to be revised within four years and periodically every seven years thereafter. The contracting parties agreed to the principle of equality of opportunity in regard to customs duties. Differentiation of rates on the land and sea frontiers was to be abolished. The signatory powers were invited to adhere to the regulations laid down, and it was stipulated that conflicting provisions in previous treaties, other than the most-favored-nation clause, should be annulled.

On August 18, 1925, the Peking government issued invitations to Belgium, France, Great Britain, Italy, Japan, the Netherlands, Portugal, and the United States, signatory to the Washington customs treaty, and to Spain, Peru, Norway, and Denmark, adherents to the

treaty, for a customs conference to assemble in Peking. This was in conformity with Article II of the Chinese customs treaty. Secretary of State Kellogg, in an address before the American Bar Association, declared that the agenda of the conference would be enlarged and that the government of the United States was prepared to consider a comprehensive revision of the tariff treaties. The American representatives were John Van A. MacMurray, American minister to China, and Silas H. Strawn, a lawyer of Chicago. The Chinese delegation consisted of Dr. Alfred Sze, Dr. Wang, and Dr. Wan Chung-hui. Dr. Sze declared that his country desired treatment upon a basis of full equality and reciprocity. The Chinese delegation proposed the following agenda:

A. Tariff autonomy.
 1. The adoption of a Chinese customs tariff for the Chinese government.
 2. The abolition of *likin*.

B. Provisional measures.
 1. The levy of an interim surtax.
 2. A surtax on luxuries.
 3. The unification of customs rates at the frontiers.
 4. The valuation of commodities.

C. Related matters.
 1. To ascertain the origin of imported goods.
 2. To provide a deposit for customs revenues.

The conference was organized into three committees which were charged, respectively, with the questions of tariff autonomy, provisional measures, and related matters. Dr. Wang made three proposals:

1. That the powers declare their respect for the principle of tariff autonomy and that they remove existing tariff restrictions.
2. That China abolish *likin* when the Chinese customs law goes into effect on January 1, 1929.
3. That during the interim, a surtax of 5% shall be charged on all goods. A tax of 30% should be charged on grade A luxuries, and 20% on grade B luxuries. The 5% ad valorem tax was to stand.

Dr. Hioki of the Japanese delegation made two alternative proposals: in the first place, he suggested that China should pass a statutory tariff of general application and that special tariffs on certain articles should be agreed upon between China and interested states

through separate treaties. In case China did not follow this course, he suggested that a graduated tariff should be established along the lines of the old treaties of 1902 and 1903, which established a tax of 12½ per cent ad valorem. After considerable discussion the contracting parties, other than China, agreed to recognize the Chinese right to tariff autonomy. They also agreed to remove the tariff restrictions contained in their treaties with China and to consent to the operation of the Chinese tariff law on January 1, 1929. China, on her part, agreed to abolish *likin* simultaneously with the enforcement of the tariff law, and agreed that the abolishment would be effectively carried out on that date. The committee on provisional measures divided itself into technical committees on *likin* and other problems. The agenda on this committee concerned compensation to be made to the provinces in lieu of *likin,* the consolidation of debts, the allotment of funds for constructive undertakings, and the administrative expenses of the national government. The Japanese government impeded the progress of the convention. Japan, together with the other powers, accepted the principle of Chinese tariff autonomy as of January 1, 1929. She advanced the argument that the increase in Chinese tariffs will injure Japanese trade. She also asked that sufficient revenues be ear-marked for the service of foreign loans. The powers, with the exception of Japan, were disposed to allow a 7 per cent general duty and a 12½ per cent duty on luxuries for the interim period before the Chinese tariff goes into effect. In an address before the council on foreign relations in New York City on December 14, 1925, Secretary of State Frank B. Kellogg made the following declaration in regard to the special customs conference:

> One of the Washington treaties provided for a Tariff Conference, to be held at Peking within three months after its ratification, for the purpose of giving consideration to China's desire for higher tariff rates. A Commission was provided for by Resolution V of the Conference to investigate the subject of extra-territoriality and report what steps will be necessary as preliminary to the renunciation of extra-territorial rights. The Tariff Treaty was not ratified until August 6th of this year, and the Conference is now in session in Peking. So far, there is evidence that this Conference is endeavoring to find a means of meeting the desires of China. It has unanimously adopted a resolution whereby the Powers recognize China's right to enjoy tariff autonomy and agree to remove the tariff restrictions contained in existing treaties between them respectively and China. The powers consent to the going into effect of the Chinese National Tariff Law, January 1, 1929, while China agrees to abolish what is known as *likin,* that is, local taxes on goods in transit within China, simultaneously with the en-

forcement of the Chinese National Tariff Law. The duties on exports and imports to be applied pending the abolition of *likin* and the granting of tariff autonomy are now being considered.

There was much difference of opinion as to the tariffs and classifications which should prevail pending the application of the Chinese tariff law. The Chinese suggested rates which were uniformly high. The powers differed on the question. But the greatest difficulty was the disorganization in China due to the revolutionary activities. The foreign delegates sought to know with whom they were dealing, what conditions would be asked, and what reliance might be placed on their representations. The delegates of the powers, after several months of futile negotiations, adjourned the conference in July, 1926.

Summary of American Policies in the East.—The policies of the United States in the Far East and in the Pacific Ocean have essentially been peaceful ones, especially as regards China, where we have, in the words of Secretary of State Kellogg, "a liberal and forward-looking policy." It has been in the main influenced by the principle of the Open Door, which means equal opportunity for trade, commerce, and intercourse with China, as opposed to leased territories, spheres of interest, and special concessions. In 1843 Daniel Webster, in his instructions to Caleb Cushing, declared: "You will signify in decided terms and a positive manner that the government of the United States would find it impossible to remain on terms of friendship with the Emperor if greater privileges or commercial facilities should be allowed to the subjects of any other government than should be granted to the citizens of the United States." This principle was reaffirmed in the treaty of 1844 in the form of the most-favored-nation clause. This is the foundation of the policy of the Open Door. Secretary of State Hay, through international agreement, secured the recognition on the part of the powers of the territorial and administrative integrity of China. Many violations of this principle have taken place, but the United States has always appeared as its champion through peaceful means. The policy of the United States has involved a spirit and practice of coöperation with the interested powers in various and decisive ways. The policies of the United States in this region are ably set forth by Secretary of State Hughes in his celebrated address on the centenary of the Monroe Doctrine, delivered at Philadelphia on November 30, 1923:

In relation to the Pacific Ocean and the Far East, we have developed the policies of (1) the Open Door, (2) the maintenance of the integrity of

China, (3) coöperation with other powers in the declaration of common principles, (4) coöperation with other powers by conference and consultation in the interests of peace, (5) limitation of naval armament, and (6) the limitation of fortifications and naval bases.

VI. Military Policy and the National Defense

The American Theory of National Defense.—The military policy of the United States, as of every other sovereign state of world importance, is inter-related with, and determined by, its foreign policy. Indeed, the two cannot be considered apart. The major foreign policies of the United States are peaceful in character and design. They are not ambitious or aggressive. Foreign policies based on the principles of conquest and power must have back of them great standing armies and navies to give them practical effect. Policies which have as their purpose the maintenance of peace do not require that a state be organized primarily for war. The American theory of national defense is to maintain such military forces as are adequate for cases of emergency, and to rely on its citizens for its defense in crises.

The geographical situation of the United States has influenced our military policy, as it has deeply affected the foreign policy of the country. With a continental territory extending from ocean to ocean, and with neighbors disposed to peace, we have had little need for a great standing army. We are not surrounded by states having a history of or a disposition for war. Our relations with the states of Latin America, based in large measure on the principle of Pan-Americanism, have led to a general condition of peace. The nations of the Far East, with the primary interests of that region, are far distant, and we have little to fear from their internal concerns. The only strong power in the world which touches the United States territorially, and in other ways, is Great Britain, with which, fortunately, the mutual traditions of peace are strong. The two countries have seen fit to work out their foreign problems together, and to refer to arbitration such disputes as cannot be settled by ordinary negotiation. Moreover, these states have worked together in recent years for peace arrangements likely to be more or less permanent. Examples are the Paris Peace Conference, where Lloyd George and President Wilson worked together with splendid understanding, and the Washington Conference, where Mr. Balfour and Mr. Hughes stood shoulder to shoulder in support of the main proposals before that body. A state is not in need of a great army if it is relieved from the necessity of

defense, permanent or occasional, against other states, large or small. Especially is this true when a nation has seen fit to avoid political and military alliances. Thus from the standpoint of its geographical location, its peaceful foreign policies, and its freedom from embarrassing commitments, the United States has been able to follow a military policy for defensive purposes only.

We have not until recent years become a colonizing power. There has been no desire on the part of the people of the United States to control the so-called "backward peoples" of the world. Having experienced, during colonial days, the administration of our affairs from another shore, we were content to rule ourselves, without assuming the serious responsibility of directing the destiny and affairs of others. One of the deterrents was the expense in maintaining the military establishments necessary to such an undertaking. The agricultural and industrial conquest of our country was sufficient to command all the surplus capital and energy of the commonwealth. Again, there was little desire on the part of the United States to control the seas, or to exercise sea-power beyond the necessary amount to protect our maritime rights in peace and war. Our foreign trade has been developed in the spirit of equality and justice. Our interests have brought us into opposition, and even into conflict with certain sea powers, but our efforts have been directed against the economic monopolies and the restrictive commercial measures of these powers, and have not been manifestations of power for its own sake.

Our foreign policies, while pacific in character, are also defensive ones. They have been adopted, in the main, to reduce to a minimum the causes of conflict with foreign states. As long as they are respected, peace is assured. It may be necessary, however, to defend them. A war to defend a great foreign policy which has prevented conflicts for a century is more justifiable than a conflict for any special or local cause. The Monroe Doctrine is a defensive policy of the United States. Its application has diverted conflicts having to do with Europe from this hemisphere, and hence from the United States. We might conceivably have to go to war to defend this, our most characteristic foreign policy. Its maintenance has required intervention, and even some imperialism, to assure its unbroken continuance. Occupying a certain primacy on this hemisphere, and championing certain ideals with regard to it, we must be ready to defend these ideals when our interests require it. Our interests in the Far East and the Pacific area require a preparedness for their protection. Our policies in this region are also based on the principle of equality and of respect for the rights

of other states. Here we have acted in concert with the other powers to protect, sometimes by force, our interests, and to give effect to the policies to which we are committed. In Europe, we have few interests politically, and we will probably join in European conflicts only when our interests so dictate, or when our rights have been plainly invaded without adjustment or chance of redress.

The possessions of the United States, however, must be protected. They are essential to our prosperity and to our national life. The Panama Canal, built for civilization as well as for ourselves, will always have adequate protection. The construction of this canal, under agreement with Great Britain, has given this country a permanent interest in the Caribbean region which will always require and receive our utmost solicitude, from the defensive standpoint. Our other possessions, especially the insular ones, do not enjoy the protection of the continental United States. They constitute in a sense a modest far-flung empire, which must be protected from the aims of such powers as would like to attack or seize them. They are important to us strategically and commercially. On our part, it is our obligation to govern and to protect the natives of these islands, and to provide the best possible opportunity for their self-development. In the Pacific region, the Hawaiian islands and the Philippine islands, two extensive archipelagos, require our defense. The four-power pact, already discussed in a previous section, has reduced the danger of attack, as Great Britain, France, the United States and Japan have, for a period of ten years, mutually guaranteed their insular possessions located in the Pacific Ocean. In the Caribbean region, other than the Canal Zone, we are interested in the defense of Porto Rico and of the Virgin Islands. By conventional and *de facto* arrangements, we are interested in the defense and internal welfare of Haiti, Santo Domingo, Cuba, and Nicaragua in very special and definite ways. Our forces may be required to protect them against other powers or even against themselves. These states are in a sense protectorates, and while not a part of the American constitutional system they nevertheless share our defensive power.

The second amendment to the Constitution of the United States declares: "A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." Thus the security of the state is provided for, and the right is constitutionally declared. The dread of large standing armies caused the people to place the greatest confidence in well-organized militia. Its purpose is to maintain order and to defend the

state. The people preferred a citizen to a professional soldiery. The third amendment provides that "No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law." Against the grievance of quartering large bodies of armed troops in the colonies, the people continued earnestly to protest. This petition found a place in the Declaration of Independence and other protest literature of the period. By the Constitution, the accommodation of soldiers during peace is made to depend on the consent of the owner, and during war on the law. These provisions are designed to prevent military abuses, and in no sense to deny to the soldiers their just rights.

Our constitutional arrangements provide for civil control of military policy. The President is the Commander-in-chief of the Army and Navy. He usually associates with him civilians as Secretary of War and Secretary of the Navy. The power to declare war is lodged in Congress. It is the business of the Congress to determine military policy, to fix the strength of the military forces, and to pass the appropriation bills for their maintenance. The framers of the Constitution fixed for all time, unless there should be an amendment to the contrary, that the military departments should be controlled by the civil authorities. Our theory of national defense, therefore, is, in a word, to limit our preparations for war to necessary defensive measures, to subject military policy to strict civil control, and to place a major reliance, insofar as the army is concerned, on a trained citizenry rather than on a great professional army. By the same token, our interests have required the development of a navy in keeping with the security and protection of our coast-lines and our insular possessions.

The United States Navy.—The United States Navy has within recent years reached its position of power and consequence. It is an arm of the government service which has always intrigued our interest and has caught our imagination. With it is connected the idea of power, as also of prestige. No great state has developed its *imperium* without a naval force. The wonderful development of the British Empire gives evidence of this. A great navy inspires respect abroad. Once a question becomes one of pride or prestige, governments and peoples close their eyes to peaceful solutions and demand settlement on their own terms, or resort to force. Nothing so typifies the respect a nation would have abroad as a navy. It presents a physical manifestation of the ideas of power and prestige which break down the barriers of Congressional opposition when naval increases are sought. Then, too, the navy in a real sense relates us to the world. It plows the

seas, where nothing but international law and the laws of the United States apply, so far as its citizens and ships are concerned. It protects such overseas possessions as we own. Its chieftains are often entrusted with diplomatic missions. It forms the second line of defense, and ranks next to the diplomatic service in keeping the peace. It is an international institution, attached to a national state.

The United States Navy has had the support of the entire people. Political parties have at no time divided on the question of the navy. The army must be in politics to some extent, as the question of its maintenance requires the close attention of Congress. Sometimes men with little military training or experience feel that they are competent to lead an army to victory. Such a feeling about a squadron is possible only to the ignorant, for the administration of the navy or the running of a ship is a technical business which requires special knowledge. All parties have commended a progressive naval policy in their platforms. The Republican party has declared for a navy which will be adequate to defend against attack, uphold the Monroe Doctrine, and guard our commerce. In 1916 the Republican platform declared: "We must have a navy so strong and so well proportioned and equipped, so thoroughly ready and prepared, that no enemy can gain command of the sea and effect a landing in force on either our Western or our Eastern Coast." To secure these results, it was declared that there must be a "coherent continuous policy of national defense." In 1924 the Republican platform provided: "We pledge ourselves to round out and maintain the navy to the full strength provided by the United States by the letter and spirit of the limitation of armament conference." The Democratic Party has declared for a navy which will defend our seacoasts and preserve the rights of American citizens wherever they may be jeopardized. In 1916 this party pledged a "fixed policy for the continuous development of a navy, worthy to support the great naval traditions of the United States and fully equal to the international tasks which this nation hopes and expects to take a part in performing." In 1912 the Progressives, pending an agreement for the limitation of armament, were pledged to a program of two battleships a year. Presidents of all parties have contributed to the growth of the navy, and have regarded their share in its development as a matter of pride. Grover Cleveland put the American Navy on a real war footing. Theodore Roosevelt contributed more than any other American to its power, glory, and prestige. Woodrow Wilson, a lover of peace, declared that during his term of office "the Congress of the United States poured out more

money than was poured out on the average in any previous years in the history of the United States for the maintenance and upbuilding of the United States Navy.'' In his address in favor of preparedness he advocated that this country build the greatest navy in the world. As Commander-in-chief of the Navy during the World War he saw a modest realization of his aims. The Navy, therefore, is not a matter of party or section, but a matter of national pride. Even the interior regions believe in it. Theodore Roosevelt declared, in 1910, in addressing an audience in the Middle West:

> Friends, the navy is not an affair of the seacoast only. There is not a man who lives in the grass country, in the cattle country, or among the Great Lakes, or along the Missouri who is not just as keenly interested in the navy as if he dwelt on the New England coast, or the Gulf coast, or on Puget Sound. The navy belongs to all of us. If it wins credit for the nation, it wins for all of us.

The modern American navy dates from 1883. At that time the country was enjoying great industrial development and prosperity, and its navy was wholly incommensurate with its power, resources, and interests. In that year Congress authorized the building of three steel cruisers and one steel dispatch boat. In 1886, under Grover Cleveland, five new steel ships were provided for. Other improvements and extensions followed. The Spanish-American War and the administration of President Roosevelt gave to naval development an impetus which was destined to stop only when the strength of a world power was attained. Between the years 1883 and 1921 a sum of more than eight billion dollars was spent on the navy. One reason for it was the growth of our export trade. President Hayes frankly mentioned this as one of the services which a navy could render. Since then it has been put to many practical uses. Its existence has protected American interests in international crises, such as the Samoan difficulty of 1898. It is in constant police duty in the Caribbean Sea. Revolutionary conditions in these countries require the presence of ships, first, to protect American interests, second, to maintain order, and third, to prevent the intervention of European countries. The navy is used to patrol Chinese rivers in the interests of American missionaries and merchants. Its use is by no means limited to defensive measures as applied to the United States and its possessions. It is the chief means of assuring protection to the lives, property, and interests of our citizens the world over.

The navy became in time not only a service institution for defense and protection, but an embodiment of national greatness. It became identified with power, and to many was a demonstration of power. Admiral A. T. Mahan of the United States Navy directed the attention of the country to sea power. His conclusion was that any great state must be supported by a powerful navy. Theodore Roosevelt, who became Assistant Secretary of the Navy in 1897, at once began to promote the interests of his department in and out of season. He attacked many leaders of his own party on account of their indifference to his naval plans. To oppose or to be indifferent to them was, according to Mr. Roosevelt, to be lacking in character and backbone. As President, he employed the navy in interesting ways. In sending the fleet around the world, he sought to provide for security at home and for prestige abroad. He also used the navy to intervene in the situation at Panama, which resulted in the recognition of that republic by the United States. The navy was a passion with him. He regarded it as a symbol of national greatness and strength, and identified it with the sturdy virtues of hardy and enduring races and men. He said:

> To build up those fighting qualities for the lack of which in a nation, as in an individual, no refinement, no culture, no wealth, no material property can get along. . . . All the great masterful races have been fighting races and the minute that a race loses the hard, fighting virtues, then, no matter what else it may retain, no matter how skilled in commerce and finance, in science or art, it has lost its proud right to stand as the equal of the best. . . . We ask for a great navy . . . partly because we feel that no national life is worth having if the nation is not willing, when the need shall arise, to stake everything on the supreme arbitrament of war, and to pour out its blood, its treasure, and its tears like water, rather than submit to the loss of honor and renown.

Of the varied purposes for which the navy is maintained, the most ideal is that of international peace. Nor is its work as short of the ideal as some would think. The existence of a great naval power in the background has exerted a tranquilizing influence in many situations. Preparation for war may or may not be the greatest guarantee of peace. Naval power, however, is not necessarily inconsistent with world peace, and will be necessary in any effective program for the enforcement of the considered opinion of the world against an offending state.

The United States Army.—The army of the United States had a rather unofficial birth. At the Battle of Lexington seventy American farmers lost their lives in attempting to stem the tide of eight hun-

dred trained British infantrymen. The British pressed on to Concord, where they were met by a group of American minute-men, who made their stay a short one, and forced their retreat to Boston. Fighting continued in this fashion until the Second Continental Congress regularized the army organization. Several generals were commissioned to lead special movements. Washington, who was finally made Commander-in-chief of the colonial forces, found himself face to face with a tremendous task. Lack of money and supplies, short enlistments, and other causes made his course difficult. On two occasions the Congress considered relieving him of his command. There is little doubt that in moments of discouragement he would gladly have handed his commission back to Congress. The grand total of the American Revolutionary Army was 395,858, consisting of 231, 771 Continentals, and 164,087 militia. Great Britain had a total of 150,605 men. The strength of the army varied from year to year. Congress, fearing military control of the country and the impairment of civil rights, would not establish a permanent army. Nothing but patriotism could make men fight under such conditions, without pay in many instances, and with little food and clothing. The statesmen of the period were inexperienced in military affairs, and of course mistakes were made in military legislation. A confederation did not prove to be an effective form of government under which to wage a war for independence. Its quotas and requisitions might be resisted by the states. There was no really centralized organization of the new state endowed with real power. The raw American troops had to face the disciplined British soldiers. This condition could not be remedied, but it was an additional hardship. The short enlistment period was especially dangerous to the American cause. Washington, in discussing the discipline and training of an army, remarked that we should have a good army rather than a large one. The pay of the Congress to the soldiers was small, and very uncertain. Some served the entire period without pay. Extravagant promises were made to the men and officers if they would stay through to the end. Only genuine patriots could have endured such hardships. The lessons of the Revolutionary War left little to guide us in our military policy, for it was our first attempt, and the conditions which obtained then did not exist at later times. On January 3, 1784 the Congress took steps to disband the army, passing the following resolution:

> And whereas, standing armies in time of peace are inconsistent with the principles of republican governments, dangerous to the liberties of a free

people and generally converted into destructive engines for establishing despotism;

Resolved, That the commanding officer be and he is hereby directed to discharge the troops now in the service of the United States, except twenty-five privates to guard the stores at Fort Pitt and fifty-five to guard the stores at West Point. . . . No officers to remain in the service above the rank of Captain.

After the war the United States Army consisted of eighty-four watchmen, with a Captain of Field Artillery (John Doughty) at one time commander-in-chief! Indian troubles on the frontier and discontent amounting to civil war in Massachusetts required further reliance on the militia. The army consisted of 595 men when the Constitution was adopted, although the miltary legislation called for an army of 1283. The same law authorized the President to call out the militia in defense of the frontiers. A number of Indian expeditions were set on foot. The Whiskey Rebellion in Pennsylvania required a demonstration on the part of the government. The Pennsylvania militia refused to aid, but the appearance of the militia from other states induced the insurgents to retire. When the French Revolution broke out, in 1789, the Congress, anticipating trouble, arranged for a regular army of 40,000 and a volunteer footing of 75,000, but nothing came of the plans. Thomas Jefferson, as President, placed his confidence in the militia and volunteers. It was merely a part of his whole domestic and foreign policy. During our twenty-five years of constitutional govment we had fought several Indian wars, three internal insurrections, and naval engagements with France and Tripoli.

We faced the War of 1812 with no definite military policy. Congress at first authorized an army of 35,000 men, and a militia of 100,000 men was also called for. The governors of Massachusetts and Connecticut did not furnish their quotas, on the ground that the militia could be used only for domestic troubles and not for international wars, and that, furthermore, their services might be needed at home. The war was not a decisive one from the standpoint of land engagements. Congress induced enlistments by offering bounties at the end of the enlistment period. During the conflict the United States used a total of 235,839 men; but this number does not seem so impressive when consideration is given to the fact that there were never more than 5000 men engaged in combat at a single time. The enlistments greatly exceeded the number used in actual engagements. The regulars numbered 56,000, and the militia, volunteers, and rangers, 471,-

000. The largest British force was 16,500. Many of the difficulties encountered grew out of unwise military legislation. The short enlistment period, the untrained and inefficient officers, and the small regular army were handicaps from the start. The Treaty of Ghent made no mention of the issues of the war, and the peace settlement, like the military engagements, was inconclusive.

After the War of 1812 Congress reduced the army, but fixed the peace-time force at 10,000 men. We then had at least a permanent force with line and staff represented. Andrew Jackson, as Commander-in-chief of the army, had difficulties with the war department, which made a practice of sending orders to troops independently of the military organization. Jackson refused to recognize orders for anyone save such as passed through his hands. John C. Calhoun, as Secretary of War, approved Jackson's plan. Some of the most troublesome Indians were those Seminole tribes in Florida and Georgia, whose uprisings Jackson soon quelled. The Seminoles, however, revolted again and precipitated the so-called "Florida War." This was at length settled in favor of the United States, but only after a great power had struggled with 1200 warriors for a period of seven years. The Mexican War was in the offing. Texas had been recognized as an independent state, and had been admitted to the union in 1845. Mexico had never recognized Texas' independence. Certain claims held by Americans remained unadjusted by the republic of Mexico. There was a standing dispute as to whether the Rio Grande or the Nueces River was the southern boundary of Texas. General Zachary Taylor was sent to Texas, with instructions to call for volunteers from the southern states in case Mexico should declare war or "commence hostilities by crossing the Rio Grande." In January, 1846, he was ordered to the Rio Grande, where he encountered a Mexican army. After a Mexican demand that General Taylor retire to the Nueces River had been refused, the hostilities began. The Mexican military engagements were favorable to the United States. The practice of using militia yielded to that of using volunteers. General Taylor and General Scott had the prudence and good fortune to train their men thoroughly before leading them into definite engagements. Scott's army never amounted to more than 14,000 men. About 31,000 regulars, 60,000 volunteers, and 12,000 militia, or upwards of 100,000 men, were enlisted. The Mexican strength was about 46,000. A number of officers in the American army had gained experience in the Indian Wars, and some of the younger officers were graduates of West Point. Scott gave credit for the comparatively easy victory to the graduated cadets,

while General Grant, then a young officer in the army, accredited it to the tactics and strategy of Scott.

We approached the Civil War with a military record of having participated in some small Indian engagements and with a negligible military force. We were totally unprepared for this sanguinary and fratricidal conflict. A country with an area of three million square miles and a population of thirty-one millions was defended by an actual army of 16,367. The Confederacy declared war, and its President, Jefferson Davis, called for an army of 100,000 volunteers. The Confederates mustered an army of 35,000 men and took possession of certain forts. Lincoln issued a call for 75,000 troops to repossess the captured forts and property. Congress was not in session, so the regular army could not be expanded, and the volunteers could not be authorized. Hence he had to fall back on the state militias. The response from some sections was not gratifying. In time he assumed the war powers of Congress—the only course open to him. On May 3, 1861, he increased the regular army to 22,000, the navy to 18,000, and called for a volunteer force of 42,000. When the Congress met, it found a force already augmented to the extent of 230,000 men. Thus Constitutional action by Congress was forced by the President, who had to act independently to save the Union from dismemberment. Unfortunately, a dual organization was maintained at the start. The enlistment period, however, was fixed at three years, as an insurance against an army of recruits. In this struggle the West Point man was to play a distinguished part. The Northern forces lost a number of trained officers, who resigned their commissions to join the Southern forces. After the bloodiest war in the history of the Union the Northern forces compelled the surrender of the Confederacy on April 9, 1865. The country was unprepared for the emergency, due possibly to its domestic character. Volunteer officers, until they learn by experience, commit many mistakes, and their process of education is often costly in men and money. Instead of replacing outfits with new men, new regiments were assigned to new sets of officers, and in each case the process of organization had to be learned anew. As the three-year enlistments expired, the officers were confronted with a crop of recruits. "For the duration of the war" is the only safe enlistment period. The bounty system was used, but not with the best results; it did not always stimulate recruiting, and often led to desertions. The application of enforced service, although at first faulty, solved the problem of effective recruitment when properly applied.

The Union army totalled 67,000 regulars and 2,606,341 volunteers and militiamen, as against about a million Confederates.

The Civil War was a costly one. Until 1914 its cost was about five and one-third billion dollars; four and one-half billions, in addition, having been paid in the form of pensions. The incalculable loss was the greater. The lost man-power, the impoverished men, widows, and children, and the economic and social losses struck at the roots of national life and prosperity. The Union lost 380,100 men killed in action and died of wounds or disease. The Confederacy lost about 214,673, making the total loss to the country almost 600,000 lives. The immeasurable gain through the preservation of the Union and the destruction of slavery should not close our eyes to the losses as well, both tangible and intangible.

When the Spanish-American War broke out in 1898, we had a regular army of 28,183 officers and men. Spain at the time had 196,828 men in Cuba, and 9000 in Porto Rico. On April 23, 1898, the President called for 125,000 volunteers, and the army was increased by further legislation from time to time. In this war the militia was not called upon, and volunteers only were pressed into service. No one could enlist for a period of less than two years. The regiments were officered by regular army officers, and the system of bounties was ignored. Moreover, the government did not call more troops than it could use. The struggle was against the diseases of camp life and of the tropics as well as against the Spanish forces. During the war the United States used 58,688 regulars and 223,235 volunteers. The Spanish numbered 228,160. Only 289 were killed in battle or died from wounds, while 3848 died of disease. Most of the volunteers did not see action. The total cost of the war, exclusive of pensions, was $321,833,254.

The United States Army was engaged prior to the World War in a number of military undertakings, such as the Philippine insurrection, the Boxer rebellion in China, the reoccupation of Cuba, the protection of the Panama Canal Zone, the Mexican border troubles, and the Pershing expedition into Mexico. After the declaration of war against Germany General Pershing was sent to Europe on May 28, 1917, as the Commander-in-chief of the American Expeditionary Force. President Wilson and Secretary of War Baker gave him a free rein in military affairs connected with his command. There was no political interference with the business or the engine of war. Pershing cabled back that a million men should be sent to Europe by May,

1918. The strength of the American army on the day of the armistice was 3,670,888 officers and men. By the middle of the next year the army had been demobilized. The war, of one year, seven months, and five days duration, cost the United States twenty-two billion dollars. Ten billion dollars were loaned to the Allies. Our losses amounted to 48,900 killed in action and 230,074 wounded. Including 56,991 who died of disease, the total loss was 112,422. The grand total of our military establishments amounted to 4,800,000 men. The American forces engaged in two hundred days of battle and fought thirteen different engagements.

The application of the principle of compulsory military service resulted in a successful military establishment. It not only provided an army without the uncertain reliance on the enlistment principle, but it was fairly applied. The various land forces were composed, first, of the Army of the United States, commonly called the Regular Army, which is recruited by volunteers for a term of years, and for which the term of service, strength, and other details are fixed by law; next, special volunteers for a specific period, as a term of years, or for the period of the emergency; third, the militia or National Guard, composed of state divisions, which was federalized in 1916, and was constituted a part of the national army in 1918; finally, the drafted men, chosen under a selective service act. The draft was applied during the Civil War and the World War in different forms. The calling of the men during the World War was a civil function, and was discharged by civilian draft or exemption boards in local districts. Upon induction into the service, the soldier or sailor became subject to military law.

After the demobilization of the army Congress passed the National Defense Act of 1920, which provided for a regular army of 16,635 officers and 280,000 men. An attempt was made to bring the army up to this new peace strength. In June, 1922, Congress, in a retrenching frame of mind, reduced the army to 175,000 men; and two reductions have taken place since then, limiting the army to 125,000 men and 12,000 officers. The United States Army under existing legislation is composed of the Regular Army, the National Guard, and the Organized Reserve. The purpose of the Regular Army is to train the citizen units, to serve where continuing duties are required, to provide an adequate domestic force, to man our coast defenses, and to guard our overseas possessions. The National Guard is essentially for service in case of an emergency. The plan of Congress was to augment its strength to upwards of 400,000 men by 1924, but its ac-

tual strength in 1925 was 177,525 officers and men. The Organized Reserve in peace-time is made up of an organization of Reserve Officers, forming the nucleus for the great citizen army in case of an emergency. They must have the training of regular officers in order to be effective. The Reserve Officers Training Corps in the universities and colleges of the country must be relied upon to replace the ranks of the reserve officers who for one reason or another drop out of the service. In 1924 about 4700 reserve officers were graduated from these institutions. The Citizens' Military Training Camps were established in order to train young men who could not have the advantage of college or university instruction. They are designed to take the place of universal military training. In 1925 it seems that 55,851 young men applied for this training, but only 33,404 could be accepted. As compared with other countries, the present force of the United States is conservative in its fighting strength. Russia in 1923 had 928,000 men, France 769,630, Japan 275,000, Italy 250,000, Great Britain 560,700 and the United States 125,000. Changes since then have been negligible.

Constitutional Provisions.—Under the Constitution, Congress is authorized: (1) to raise and support an army and navy; (2) to make rules and regulations for their government; (3) to provide for the organization, arming, and disciplining of the militia in the states; (4) to utilize the militia to enforce the laws, suppress insurrections and repel invasions; (5) to declare war and make rules for captures on land and sea; and (6) to make all laws that are necessary and proper to carry these powers into effect.

Universal War and Military Service.—The draft laws of 1917 and 1918 raised in the United States the question of universal military service, and of the conscription of the nation's population and resources in time of war or other national emergency. The various proposals of compulsory military service for all young men of appropriate ages have not been well received in this country. The selective draft principle is accepted as a war measure, but not as a peace-time or training measure. The system of compulsory training in American colleges has been the subject of recent attack. The opponents of the measure argue that young men should not be compelled, as an incident to their college education, to take the time for such instruction against their will, when no other classes of young men are subjected to similar requirements. Its purpose, it is argued, is to develop in the soldier the fighting instinct to its highest point of efficiency. This, it is said, is leading us toward the European system, with its

consequent mistakes and wars, and is entirely out of keeping with the movements in the direction of peace. The army officers and university officials fly to the defense of the plan on the ground that the instruction is sound and is an excellent part of a young man's education; that the physical training and the discipline gained through the restraints of the soldier are invaluable; and that it is in keeping with a sound policy of national defense. Unfortunately, the discussion has in some instances become one between pacifists and disarmament enthusiasts, on one hand, and War Department bureaucrats and university administrators, on the other. It is a proper subject for discussion on the part of citizens and legislatures, both national and state. The statements of men who carry out the laws, who are servants of the state, have force and effect, not because of their own views or opinions, but only as they represent the constituted authorities which have decreed that the training shall take place. On the other hand, the manifest advantages of such training in time of war cannot be overlooked. It is within the right of state legislatures or boards of regents of state universities, and boards of trustees of private institutions, to stipulate the conditions under which students may attend college. The President of the University of California has declared: "The state of California, the people of California, through their representatives duly chosen, have determined and said how the young men of this state may attend the University of California, not as an inherent right, but as a privilege." On the student's part, he must pay, said the President, a small fraction of the cost of his education, and attend military training courses two hours per week for two years. This is not a large task for the great privilege of an education. The War Department and the college officials are well within their rights under existing legislation. The task before them is to make the requirement an attractive endeavor rather than a chore.

The movement today is in the direction of marshaling the resources of the nation in case of another war. The Democratic platform of 1924 provided: "In the event of war in which the man power of the nation is drafted, all other resources should likewise be drafted. This will tend to discourage war by depriving it of its profits." Secretary of War Dwight F. Davis, in an address before the Union League of Philadelphia (November, 1925), declared:

> We are now prepared to equip any military force up to four million men more rapidly, completely, and economically than a new army of that

size has ever been equipped before. That is because we have a systematic plan for the mobilization of industry in case of war.

It is the first time in our history that we have had such a plan, or a plan for the mobilization of man-power which is worthy of the name. Consequently the country today is in a better state of preparedness for national defense than ever before in its history in time of peace. This condition will continue as long as we maintain our war reserves of ready equipment—which are now endangered—and replace experienced veterans of the World War with younger and properly trained leaders.

The Secretary, like most administrators, has fallen into the error of regarding his own management as the best. But he does disclose his plans and the drift of American policy. While the drafting of all man-power and resources may be just, the indefinite extension of the policy of conscription is not without disadvantages. It makes war a process of conclusion, rather than of exclusion; makes it more terrible and its consequences greater. There is some merit in distinguishing between combatants and non-combatants, and in limiting belligerent operations to the combatant classes. Under this system the rights of war are defined, and its procedure is regulated. The non-combatants are assured of certain rights. It reduces the number engaged in conflict, and therefore reduces the damage and suffering. When all men and women become combatants and all resources become contraband of war, the militarization of the world will be at hand. The road to peace does not lie in comprehending all citizens within the soldiery.

Military Law and Martial Law.—Military law is enforced against members of the Army and Navy during peace and war. It does not absolve from responsibility under the civil law, and the action of civil and criminal courts may follow punishment inflicted by a court-martial. It should be borne in mind that military law affects only members of an armed force.

The military forces are sometimes used by the civil authorities to keep or to restore the peace. It is a part of the police power of the state, and martial law goes into effect when the military authorities displace the usual civil administration. Martial law is proclaimed and administered by the military authorities, and applies to the inhabitants of the region covered by the proclamation. It can be proclaimed only in case of invasion, disorder, or war. There must be an actual necessity, and the closing of the civil courts is evidence of such condition. The proclamation of martial law does not have the effect of

suspending the constitutional rights of the citizen. For example, the proclamation of martial law does not of itself suspend the writ of *habeas corpus,* which under the Constitution can be suspended only in case of rebellion or invasion when the public safety demands it. Only Congress can authorize the suspension of the writ, according to the decision of the Supreme Court.

The Limitation of Armaments.—The limitation of armament, until the Washington Conference for the Limitation of Naval Armament, was a human aspiration which always fell far short of realization. The world has learned that the theory of preserving peace through preparation for war, carried to an extreme, is fallacious. The experience of mankind and of nations is the reverse of this. Nor would peace come or stay, should the tools of war be entirely destroyed. Clearly they require definite restriction, but they cannot be entirely abandoned. Somewhere society must find the golden mean. The riddle of the ages is the inability of men to get along in international relations without dissension and bloodshed. The crime of civilization is that it does not work out some plan or scheme to prevent its own destruction. The national state has, with difficulty, reduced its internal affairs to a condition of law and order. Civilization may, in the same manner, arrive at the goal in the same trial-and-error fashion, if it survives long enough. It is unfortunate if the life history of the national state is to be reproduced through the same method in the international community. A condition of law and order of the sovereign state should be sought for. The international community might, through reasonable concession and agreement, arrive at the goal through a shorter and less bloody route.

The interest of the United States in the limitation of armament antedates the Washington Conference. The greatest limitation has been its own deliberate policy to avoid great military establishments, especially land forces. In 1817 the United States and Great Britain entered into an exchange of notes, and thereby limited the armament on the Great Lakes. This agreement, afterwards ratified by the Senate, was the beginning of the limitation movement. There was little need of further defenses in that quarter, however, and the significance of the step is correspondingly decreased. The test comes when powers agree to limit so as to affect strategic places and delicate questions. An attempt was made to provide for the limitation of armament at the first and second Hague Conferences, but German opposition prevented even the discussion of this important subject. The influence of a powerfully armed state is thus eloquently disclosed as it affects in-

ternational questions. Theodore Roosevelt, in his Nobel Peace Speech at Christiana, declared the limitation of armament to be one of the four requisites of an ordered world.

The United States was in an enviable position so far as world leadership was concerned. She emerged from the World War the wealthiest nation, and was becoming the strongest as a naval power. She could therefore afford to take the initiative in suggesting the limitation of armaments to the other naval powers, and also the maintenance of a definite ratio based on the then existing naval strength. In the efforts to bring the question before the interested powers the United States had the cordial support of Great Britain, which in effect accepted in advance, through her enthusiastic acceptance of the invitation, the principle of equality of naval power. This was encouraging, coming as it did from the power which hitherto had controlled the seas. Charles E. Hughes, Secretary of State and Chairman of the Conference, impressed the members from the start with his sincerity and his business-like proposals. In setting forth the problem, he declared:

> The core of the difficulty is to be found in the competition in naval programs, and, in order appropriately to limit naval armament, competition in its production must be abandoned. Competition will not be remedied by resolves with respect to the method of its continuance. One program inevitably leads to another, and if competition continues its regulation is impracticable. There is only one way out and that is to end it now.

To "end it now," the conference had to have a plan. Mr. Hughes had some proposals to make. He was more interested in the principle than in the method, but was careful to see that his method would accomplish the ends of the conference. The principles suggested for the guidance of the conference in the solemn deliberations upon which it was about to enter were:

1. That all capital shipbuilding programs, either actual or projected, should be abandoned.
2. That further reduction should be made through the scrapping of certain of the older ships.
3. That, in general, regard should be had for the existing naval strength of the powers concerned.
4. That the capital ship tonnage should be used as the measurement of strength for navies and a proportionate allowance of auxiliary combatant craft prescribed.

The existing naval strength was to take account of the measure of progress made in regard to ships in process of construction. In determining the ratio of strength to be maintained, and the ratio of tonnage to be destroyed, a simple rule, based on existing and known facts, was taken as the starting-point. In order to carry out the policy of abandonment and scrapping, the United States agreed to scrap fifteen ships then under construction, and fifteen old ships. It further suggested that Japan scrap a total of seventeen ships, and Great Britain a total of twenty-three. The reduced naval strength would leave an American navy of eighteen capital ships and 500,650 tons, a British navy of twenty-two capital ships and 604,450 tons, and a Japanese navy of ten ships and a tonnage of 299,700. To make the limitation effective, it would be necessary to control replacements. Accordingly Mr. Hughes proposed:

1. That it be agreed that the first replacement tonnage shall not be laid down until ten years from the date of the agreement.

2. That replacement be limited by an agreed maximum of capital ship tonnage as follows:

	Tons
For the United States	500,000
For Great Britain	500,000
For Japan	300,000

3. That, subject to the ten-year limitation above fixed and the maximum standard, capital ships may be replaced when they are twenty years old by new capital ship construction.

4. That no capital ship shall be built in replacement with a tonnage displacement of more than 35,000 tons.

With these proposals definitely before the Conference, the delegations began a serious study of them before negotiating. France and Italy were not included in these arrangements, as they were not expected to make the sacrifices the agreement would entail on account of the extraordinary condition which had affected their naval strength. Japan did not want to accept the progress made on ships under construction at the time of the Conference as the test of existing strength. Moreover, she wanted a more favorable replacement ratio, and asked for 10-10-7 instead of 10-10-6. The United States declared its willingness to scrap its ships under construction, in keeping with its proposals, but could not afford to lose sight altogether of its large expenditure of more than $300,000,000 on incompleted ships. Furthermore, competition in naval armament could not be terminated "if the powers

were to condition their agreement upon the advantages they hoped to gain in the competition itself." Japan did not press these points further, but insisted upon the *status quo* as regards fortifications and naval bases in the Pacific Ocean. The Japanese insisted that the *Mutsu,* their best ship, could not be scrapped, first, because it was completed before the Conference and therefore wrongly classified, and second, because of the feeling of the Japanese people. It was agreed that Japan should keep the *Mutsu,* and that the United States should complete two new vessels under construction, and scrap two older ones. The British Government had commenced four ships of more than the 35,000 replacement figure of tonnage displacement. These ships were sacrificed and two smaller ships were to be completed. The revised proportionate strength as found in the treaty follows:

	Capital ships	*Aggregate tonnage*	*Maxima for Replacement*	*Ratio*
United States	18	500,650	525,000	10
Great Britain	22	580,450	525,000	10
Japan	10	301,320	315,000	6

The application of the principle of limitation to France and Italy was the next question. The Conference recognized that it was out of the question to ask these countries to reduce their navies by approximately forty per cent of the existing strength, as the three leading naval powers had done. The French naval strength, exclusive of pre-dreadnaughts, was 164,500 tons, and a total of 221,000 tons if they should be included. The suggested maximum for replacement for France was 175,000 tons. France sought 350,000 as a maximum figure, but this was ruled out as not in accord with a plan to limit armament. France at length accepted the proposal of 175,000, which was also the figure fixed for Italy. Due to the protests of France, no provisions for limiting auxiliary craft were included in the treaty. The treaty included general provisions relating to the limitation of naval armament; rules relating to the execution of the treaty; and miscellaneous provisions. It was signed at Washington on February 6, 1922, by the United States, the British Empire, France, Italy, and Japan. Ratifications were exchanged at Washington on August 17, 1923.

The British delegation opposed the American plan of limiting submarines, and even more the French demand of excluding them as auxiliary craft. The British sought their abolition. On December 22,

1921, the British delegation resolved that submarines were of small value in defensive warfare, that they led to acts "inconsistent with the laws of war and dictates of humanity," and that all nations should, by united action, "forbid their maintenance, construction, and employment." All other delegations opposed the wholesale abolition of the submarine. Elihu Root gave special attention to the illegitimate use of the submarine. He introduced resolutions regarding this feature, which were incorporated into a treaty designed to protect neutrals and non-combatants at sea in time of war, and to prevent the use in war of noxious gases and chemicals. Two rules were included in this treaty which the powers deemed "an established part of international law." They related to the status of merchant vessels on the high seas in time of war, and of the relation of the submarine to the merchant vessels.

1. A merchant vessel must be ordered to submit to visit and search to determine its character before it can be seized.

A merchant vessel must not be attacked unless it refuse to submit to visit and search after warning, or to proceed as directed after seizure.

A merchant vessel must not be destroyed unless the crew and passengers have been first placed in safety.

2. Belligerent submarines are not under any circumstances exempt from the universal rules above stated; and if a submarine cannot capture a merchant vessel in conformity with these rules the existing law of nations requires it to desist from attack and from seizure and to permit the merchant vessel to proceed unmolested.

These provisions, virtually declaratory of international law, were aimed at the practice of the German submarines which during the war had ignored the usual formalities before seizure or destruction. They have the necessary sanction to the extent that the consequential naval powers can give it. Should other great naval powers arise, their adhesion, which is invited, would be necessary to make the rules effective. The penalties for violation are sweeping. Any person in the service of any power, whether acting on his own discretion or under orders, violating these rules, would be regarded as violating the laws of war, and would be liable to trial and punishment for an act of piracy. The rules of cruiser warfare, therefore, insofar as detention, capture, and destruction were concerned, were extended to the submarine; and if the latter did not observe them, it was to be outlawed as an instrument of modern warfare. The German Government con-

tended during the war, in answer to American protests against depredations, that the submarine was a new and special instrument in warfare, enjoying a special status in international law, to which the rules of cruiser warfare could not naturally and logically apply. The use of submarines as commerce destroyers was renounced by the powers for the future, and to this principle other nations were invited to adhere. Moreover, "the use in war of asphyxiating, poisonous, or other gases, and all analogous liquids, materials, or devices," was prohibited.

The Conference agreed on January 9, 1921, upon the recommendation of an expert committee, that "it was not at present practicable to impose any effective limitations upon the numbers or characteristics of aircraft, either commercial or military." The powers party to the naval limitation treaty resolved to form a commission composed of not more than two representatives from each of the contracting powers, to consider whether the existing rules of international law covered the new methods of attack and defense due to new developments since The Hague Conference of 1907, and if they did not, what changes should be introduced as a part of the law of nations. Experts in land, naval, and aërial warfare might aid in the work of the commission. The rules adopted by the Washington Conference with respect to submarines, noxious gases, and chemicals were excluded from the commission's sphere. It was later agreed that the work of the commission should be confined to aircraft and radio. The sessions were begun at The Hague on December 11, 1922, and concluded on February 19, 1923. The American delegation was composed of the Honorable John Bassett Moore, Judge of the Permanent Court of International Justice and a world authority on international law, and Albert Henry Washburn, American minister to Austria. Judge Moore was elected President of the Commission. The General Report of the Commission is composed of two parts: Part I deals with the rules for the control of radio in time of war, setting forth the general principles of radio control, and the duties and privileges of neutrals in relation thereto. Part II deals with the rules of aërial warfare. In drawing up these rules, the Commission used the draft submitted by the American delegation. Articles were adopted governing the questions of the applicability of rules; classifications and marks of aircraft; general principles; belligerent rights; hostilities; military authority over enemy and neutral aircraft and persons on board; rights and duties of belligerents and neutrals; visit and

search, capture and condemnation; and definitions. This is a commendable attempt to apply the rules of war to aircraft, with suitable modifications consistent with the character of the instrument.

The government of the United States has coöperated with the League of Nations in discussions and conferences looking to a progressive reduction of armaments. A disarmament conference convened in Geneva in April, 1927. The United States is represented at this conference, and also participated in the pre-disarmament conference held at Geneva during the summer of 1926. The conference hopes to define disarmament in its manifold applications, and to prevent a future race in arms.

The Air Service.—A heated controversy of several years' duration has come to a head. It has involved the relation of the Air Service to the older arms—the army and navy. The policy of the United States has been to divide the air service between the army and navy, according to their respective needs, on the theory that airplanes are essentially auxiliary craft, and should therefore be attached to the more important branches of the service. Agitation for an independent air service has gained headway. This was in part due to a growing conviction that in future warfare, aircraft would be the leading engines of conflict. Lord Thompson, British Minister of Air under the Labor Government, visited the United States, and made predictions which were adopted by a gullible public as fact, to the effect that the day of land and naval warfare was over, and the day of aërial warfare was at hand. Men of the United States Air Service contended that efficiency and economy dictated a unified air command, separate from the army and navy. These officers assert that the Air Service must now operate under a command inexperienced in matters of aircraft, and sometimes indifferent and unsympathetic with its development. It is urged, against this contention, that the Air Service needs coördination with the other services, and that the need of an independent command has not been proved. Colonel Mitchell, head of the Army Air Service, severely criticised the Army and Navy Departments for their attitude toward the development of aircraft. The Colonel was undoubtedly indiscreet in ascribing to his superiors certain deficiencies in knowledge and certain remissness in their administration of the Air Service. In the end he paid the penalty of his so-called "indiscretion" through a sentence of a court-martial to five years' suspension from the service. He promptly resigned. While his claims were possibly exaggerated, there was some foundation for them. His criticism of the sending of the *Shenandoah* on an air junket at the

request of some unofficial, non-military group was warmly approved by many citizens, in view of the loss of life which resulted from the disaster. The President, in order to allay criticism and also to obtain the facts, wisely appointed an Aircraft Board. Charges of maladministration and inefficiency were denied. The commanding positions in the service are not held by airmen, because such places go to men of wide experience and knowledge of general problems, and the officers of the air are usually younger men and specialists. The board recommended some form of special representation on the General Staff for aviation. Larger pay for airmen was recommended, due to the greater risks in peace-times. The board also recommended the appointment of special assistant secretaries in the War, Navy, and Commerce Departments to foster aviation and to bring about interdepartmental coördination. The principles of a unified command are recommended for the air force. It is also suggested that the government foster an aircraft industry. These suggestions would, in the opinion of the board, have the effect of giving the new service the assistance it needs, and at the same time keep our air force within the moderate limits which efficiency, economy, and sound policy seem to dictate.

READING NOTES

Non-Intervention and the Monroe Doctrine

An excellent general work is Thomas' *One Hundred Years of the Monroe Doctrine*. Cleland is the author of a book bearing the same title. A history of the origin and development of the non-intervention principle is given in Martin's *Policy of the United States as Regards Intervention*. A complete compilation of declarations, addresses, statements, etc., American and foreign, with respect to the Monroe Doctrine, has been made by Alvarez under the title of *The Monroe Doctrine*. Professor A. B. Hart of Harvard University has a book bearing the same title.

Pan-Americanism

The most authoritative book on Pan-Americanism is by J. B. Lockey, *Pan-Americanism: Its Beginnings*. Mr. Inman, in his book on *Problems in Pan-Americanism*, treats of many subjects which concern Latin America generally rather than Pan-Americanism *per se*. Much excellent material may be found in the reports of the various Pan-American conferences, political, scientific, financial, etc. The student of Pan-Americanism should consult freely Graham H. Stuart's *Latin America and the United States*.

Recognition

For the recognition policy of the United States, the student should consult Goebel's *Recognition Policy of the United States.* The student should also consult Manning's *The Independence of the Latin-American Republics.* Extended references to recognition will be found in Wharton's and Moore's *Digests of International Law.* The novel trend given the American policy of recognition by President Wilson is discussed in Robinson and West's *Foreign Policy of Woodrow Wilson.*

Neutrality and Neutral Rights

The leading brief work on American neutrality is Fenwick's *Neutrality Laws of the United States.* Bemis has written a book on *American Neutrality.* Bernard's *Historical Account of the Neutrality of Great Britain during the American Civil War* treats adequately of the period which the title implies. For the neutral relations of the United States during the Great War, 1914–1917, the student is referred to three volumes published by the Department of State, entitled *Diplomatic Correspondence Between the United States and Belligerent Governments respecting Neutral Rights and Commerce.* For the origin of the policy of neutrality, the student should consult the works of Washington, Jefferson, Hamilton, and Madison.

The Pacific, the Far East, and the Open Door

American interests in the Philippine Islands is set forth by Worcester in his *The Philippines, Past and Present.* The case for Philippine Independence is expounded by Harrison in *The Cornerstone of Philippine Independence,* and in Kalow's *The Case for the Filipinos.* American interests in Hawaii and Samoa are described respectively in Castle's *Hawaii Past and Present,* and Watson's *History of Samoa.* The general relations of the United States with the Far East are set forth in Foster's *American Diplomacy in the Orient.* A more complete and more recent work is by Tyler Dennett, entitled *Americans in Eastern Asia.* American relations with Japan are described in an interesting manner in Treat's *Japan and the United States.* The hold of the foreign powers on China is described in elaborate detail in Willoughby's *Foreign Rights and Interests in China.* The Open Door policy is discussed in Bau's *The Open Door Doctrine.* The Chinese position is set forth by Willoughby in *China at the Conference.* Books on the *Open Door Policy* have been written by Yen and Tomimas.

Military Policy and National Defense

The best book down to the Civil War is Upson's *Military Policy of the United States.* The government organized for the war is described in Wil-

loughby's *Government Organization in Wartime and After.* A similar work is Weeden's *War Government.* For industry and national defense, see Clarkson's *Industrial America in the World War.* For naval interests, see Mahan, *The Interest of America in Sea Power.* An argument for preparedness is found in Roosevelt's *Fear God and Take your Own Part,* and *America and the World War.* For the limitation of armament and the work of the Washington Conference, see Buell, *The Washington Conference.*

The United States and Peace

For a complete history of American arbitration down to 1896, see Moore's *History and Digest of International Arbitrations,* 6 vols. The Hague Conferences are covered in the works of James Brown Scott and Holls. The Permanent Court of International Justice is fully covered in the works of Hudson and Bustamente, which are entitled respectively *The Permanent Court of International Justice* and *The World Court.*

The United States and international law is fully treated in Moore's *Digest of International Law,* 6 vols. This is the leading printed source of international law as practiced by the United States, by the dean of international lawyers, and a judge of the world court. Judge Moore has also written *International Law and Some Current Illusions.* The student is also referred to the highly meritorious work of Hyde, *International Law Chiefly as Applied and Interpreted by the United States,* 2 vols.

American interest in international coöperation and world peace is discussed in many places. The United States as a model for an international organization is presented by James Brown Scott in *The United States of America: A Study in International Organization.* The United States and the League of Nations is fully discussed in Dickinson's *The United States and the League.* See also Lodge and Lowell, *Joint Debate on the Covenant of Paris;* and Taft, *Papers on the League of Nations.* For President Wilson's defense of the Peace Treaty of Versailles and the League of Nations, see *Addresses Delivered on the Western Tour.* For the rejoinder of Senator Lodge, see *The League, the Treaty, and the Senate.* For the history of the peace conference at Paris, see Haskins and Lord, *Some Problems of the Peace Conference;* House and Seymour, *What Really Happened at Paris;* Baker, *Woodrow Wilson and the World Settlement;* and Lansing, *The Peace Negotiations.* For the peace and mediatorial rôle of Colonel House, the student should read Seymour's *Intimate Papers of Colonel House.* The work of Theodore Roosevelt as peacemaker is described by Tyler Dennett in *Roosevelt and the Russo-Japanese War.*

The student is referred generally to Moore's *Digest of International Law* for all topics having to do with American foreign relations. The diplomatic correspondence of the United States is published in a set of official documents called the *Foreign Relations of the United States.*

CHAPTER XIV

AMERICAN DIPLOMATIC PRACTICE AND PROCEDURE

I. International Agents of the State

The Diplomatic Service of the United States, which embraces the personnel of our diplomatic agents resident abroad, forms only one of the agents of the state charged with the conduct of its international relations. The person or persons to whom the management of foreign affairs is committed stand first in position and authority. Next in immediate rank are the public diplomatic agents of the state. The control of foreign relations extends also to commanders of the armed forces of the state, to agents and commissioners charged with special functions, and to persons who are accorded diplomatic privileges and functions, but secretly accredited to a foreign government. Such an agent enjoys complete inviolability as between himself, his household, and the government to which he is accredited. He can employ only such rights and immunities as are consistent with the secret character of his mission. Special agents or commissioners are not entitled to the full diplomatic character, but are extended a special, and by courtesy and agreement, sometimes a complete protection. It cannot be demanded as a matter of right.

The Diplomatic Service of the United States is a branch of the foreign service, and is charged especially with the conduct of political relations between the United States and foreign governments. Its object is ordinary negotiation and peaceful intercourse. In performing the many duties which fall to it in time of peace, it constitutes the greatest machinery for the promotion of international understanding and for the maintenance of peace which exists under the authority of the United States.

The Consular Service is the other arm of the foreign service. It is chiefly concerned with the promotion of American commercial and trade interests, and with the protection of American citizens abroad. Taken together, these branches constitute America's "first line of defense."

II. Classification of Diplomatic Agents

Adaptation of the Rules of the Congress of Vienna.—The Department of State, "for the sake of convenience and uniformity in determining the relative rank and precedence of diplomatic representatives," had adopted the seven rules of the Congress of Vienna of 1815, and the supplementary or eighth rule of the Congress of Aix-la-Chapelle of 1818. The basic character of these regulations justify their quotation here:

In order to prevent the inconveniences which have frequently occurred, and which might rise again, from claims of precedence among different diplomatic agents, the plenipotentiaries of the powers who signed the Treaty of Paris have agreed to the following articles, and they think it their duty to invite the plenipotentiaries of other crowned heads to adopt the same regulations.

Article I. Diplomatic agents are divided into three classes: That of ambassadors, legates, or nuncios; that of envoys, ministers, or other persons accredited to sovereigns; that of chargés d'affaires accredited to ministers of foreign affairs.

Article II. Ambassadors, legates, or nuncios only have the representative character.

Article III. Diplomatic agents on an extraordinary mission have not, on that account, any superiority of rank.

Article IV. Diplomatic agents shall take precedence in their respective classes according to the date of the official notification of their arrival. The present regulation shall not cause any innovation with regard to the representative of the Pope.

Article V. A uniform mode shall be determined in each state for the reception of diplomatic agents of each class.

Article VI. Relations of consanguinity or of family alliance between courts confer no precedence on their diplomatic agents. The same rule also applies to political alliances.

Article VII. In acts or treaties between several powers which grant alternate precedence, the order which is to be observed in the signatures shall be decided by lot between the ministers.

Article VIII. It is agreed that the ministers resident accredited to them shall form, with respect to their precedence, an intermediate class between ministers of the second class and chargés d'affaires.

These rules recognize four grades of diplomatic officers: ambassadors, legates, and nuncios; ministers plenipotentiary and envoys; ministers resident; and chargés d'affaires. They are accepted generally by the nations of the world. The Turkish system is distinctive,

and differs from the foregoing rules in that the ministers resident and ministers plenipotentiary are classed together. The diplomatic representatives of the United States, based upon the Vienna regulations, are: (1) ambassadors extraordinary and plenipotentiary; (2) envoys extraordinary and ministers plenipotentiary, and special commissioners, when having the rank of envoy extraordinary and minister plenipotentiary; (3) ministers resident; and (4) chargés d'affaires, commissioned by the President as such, and accredited by the Secretary of State to the ministers for foreign affairs of the government to which they are sent. Under the revised Statutes of the United States, the term "diplomatic officer" is "deemed to include ambassadors, envoys extraordinary, ministers plenipotentiary, ministers resident, commissioners, chargés d'affaires, agents, counselors and secretaries of legation, and none others."

Diplomatic Personnel: 1. *The ambassador.*—The ambassador extraordinary and plenipotentiary is the diplomatic officer of the first rank. The ambassador is accredited to the sovereign by the President. His official domicile is known as an embassy. Special considerations, as the position of the country as a world power, proximity and interest, and reasons of reciprocity, dictate the establishment of embassies. The yearly salary of the ambassador is $17,500. The fourteen embassies maintained by the United States are located in Argentina, Belgium, Brazil, Chile, Cuba, France, Germany, Great Britain, Italy, Japan, Mexico, Peru, Spain, and Turkey.

2. *Ministers.*—Diplomatic officers of the second class are styled "envoys extraordinary and ministers plenipotentiary." They are accredited by the President to the sovereign, and their official domicile is known as a legation. This constitutes the most numerous class of officials of diplomatic grade. The ministers to China and the Netherlands receive $12,000 per annum, and the rest (thirty-three in number) $10,000 per annum.[1]

3. *Minister resident.*—The minister resident is of the so-called "intermediate" class. He is accredited to the sovereign by the President, and his establishment is called a mission. There is now only one officer of this grade in the foreign service. The minister resident to

[1] Legations are located in Albania, Austria, Bolivia, Bulgaria, China, Czechoslovakia, Colombia, Costa Rica, Denmark, Dominican Republic, Ecuador, Egypt, Finland, Greece, Guatemala, Haiti, Honduras, Hungary, Nicaragua, the Netherlands, Norway, Panama, Paraguay, Persia, Poland, Portugal, Rumania, Salvador, Siam, Sweden, Switzerland, Uruguay, Venezuela, Kingdom of the Serbs, Croats and Slovenes, and one legation for Esthonia, Latvia, and Lithuania.

Liberia receives $5000 per annum, and holds a super-added consular office.

4. *Chargés d'affaires.*—The chargé d'affaires is of the third class, is accredited by the Secretary of State to the minister of foreign affairs, and may occupy an embassy, legation, or mission. This official receives one-half of the salary of the head of the mission to which he is sent. This is not at present a distinctive diplomatic grade. According to the official instructions to diplomatic officers of the United States, "in the absence of the head of the mission the secretary acts ex-officio as chargé d'affaires *ad interim,* and needs no special letter of credence. In the absence of a secretary and second secretary, however, the Secretary of State may designate any competent person to act *ad interim,* in which case he is specifically accredited to the minister of foreign affairs." Under the Act of May 24, 1924, the President may designate any officer of the Foreign Service to act as chargé d'affaires as long as the public interests may require.

5. *Secretaries of embassy or legation.*—The secretary of a mission, under international law, is a public minister. The usual privileges, immunities, and exemptions which flow to the head of the mission due to his diplomatic and representative character are enjoyed by the secretary. When the head of the mission is at his post, the secretary can perform only such official acts as are authorized and directed by the head of the mission. The minister, in dealing with his secretaries, should observe a frank, courteous, and kindly demeanor toward them. It is the business of the secretaries to carry out the instructions of their superior with speed and skill, and to "maintain in their intercourse with him an unvarying due observance of all that deference which characterizes the gentleman, and which is prescribed by the rules of good breeding. No servility, however, on their part, or any compromise of that self-respect which they owe to themselves, is expected." [2]

Before 1924 there were four classes of diplomatic secretaries. These classes have been abolished, and the secretaries are now recommissioned and reclassified as Foreign Service Officers. There are nine classifications of these officers.[3]

[2] Moore, *Digest of International Law,* IV, 433.

[3] First secretaries, counselors of embassy, reclassified as Foreign Service Officer, class 1, $9000; first secretaries, counselors of legation, as Foreign Service Officer, class 2, $8000; first secretaries not counselors, as Foreign Service Officer, class 3, $7000; second secretaries as Foreign Service Officer, class 4, $6000; third secretaries as class 6, $4000; fourth secretaries as Foreign Service Officer, class 8, $3500; 9, $3000.

6. *Commissioners and Special Envoys.*—The rank of commissioner does not have a definite place among the diplomatic grades. It is a vague title, and has varied according to the character of the business entrusted to commissioners. Sometimes the President has accredited commissioners with full powers, and at other times the Secretary of State has certified them, without diplomatic capacity. Only the commission and credentials of the commissioner can determine his true character. If his function is diplomatic, the commissioner is included in the constitutional expression, "ambassadors and other public ministers." On July 19, 1900, William Woodville Rockhill was appointed "commissioner of the United States to China, with diplomatic privileges and immunities." This was during the siege of the foreign legations at Pekin. In the absence of Mr. Conger, the American Minister to China, he was appointed to carry on negotiations with China and the occupying powers, and on February 25, 1901, was issued the following full power:

WILLIAM McKINLEY [4]

President of the United States of America.

To all to whom these presents shall come, greeting:

KNOW YE, that reposing special trust and confidence in the integrity, prudence, and ability of William Woodville Rockhill, Commissioner of the United States to China, I have invested him with full and all manner of power and authority, for and in the name of the United States to meet and confer with any person or persons duly authorized thereto by the Government of His Majesty the Emperor of China, and with the Plenipotentiaries of the Powers, they being invested with like power and authority, and with him or them to conduct on the part of the United States, the negotiations for a settlement of the pending questions between the Powers and China.

IN WITNESS WHEREOF I have caused the seal of the United States to be hereunto affixed.

GIVEN under my hand at the city of Washington the twenty-fifth day of February, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States, the one hundred and twenty-fifth.

WILLIAM McKINLEY.

By the President:
JOHN HAY,
Secretary of State.
(SEAL.)

[4] Moore, IV, p. 457.

The President may at his discretion appoint any officer of the Foreign Service to the position of commissioner.

7. *Agents.*—The title of agent is given to a diplomatic representative sent to the minister of foreign affairs of a semi-sovereign or dependent state. In 1818 the United States refused to recognize Mr. Aguirre, "Agent" of the government of Buenos Aires, as a public minister exempt from personal arrest, because at that time the independence of that government had not been recognized. In 1868 one John Hitz, then Swiss consul-general at Washington, was appointed Swiss "political agent," accredited to the United States. He was received under this title for a time, but later his name was stricken from the diplomatic list. He was personally objectionable to the Department of State, which refused to recognize him further as "political agent." The Department observed that his title was "one of a class unusual in public intercourse between independent states," and "not referable to any of the recognized grades of diplomatic intercourse." Soon Mr. Hitz resigned and vacated the office, and subsequently the Swiss government established a legation at Washington.

Only one office of agent is now maintained. The Agent and Consul General to Morocco receives $7500 per annum.

8. *Counselors of Embassy or Legation.*—Counselors of embassy or legation stand next in rank to the head of the mission. Under the reorganized foreign service, counselors of embassy are classified as Foreign Service Officers of class one, and counselors of legation as Foreign Service Officers of class two. It is the highest rank to which one can aspire, short of the headship of the mission.

9. *Attachés.*—The term attaché embraces a number of officials of the foreign service who do not enjoy a diplomatic character, but who are attached to the mission. They are in no sense in the line of diplomatic succession. Their names appear on the diplomatic lists, however, as having membership in the staff of the mission. The Washington diplomatic list now includes the following classes of attachés: Attaché; military attaché; assistant military attaché; assistant military attaché for aëronautics; naval attaché; assistant naval attaché; naval attaché for aëronautics; commercial attaché; assistant commercial attaché; financial attaché; air attaché; agricultural adviser.

The Military Attaché

A military attaché, declared Secretary of State Sherman in 1897, is a sort of aide-de-camp to the ambassador or minister to whose em-

bassy or legation he is appointed. The orders of the head of the mission must be obeyed, except where they are manifestly in conflict with the instructions of the Secretary of War. In that event the attaché must so inform the head of the mission, and communicate the circumstances to the Adjutant-General. In case of continued strained relations, the attaché should request a recall. The attaché is first the military adviser of the head of the mission. He is also expected to collect information in regard to the military affairs of the country to which he is accredited. Information thus acquired is sent to the General Staff of the War Department, where it is properly classified and recorded. Information is sent by the General Staff to the military attachés of the United States.

The Naval Attaché

The naval attaché performs for the Office of Naval Intelligence the same functions as the military attaché for the Department of War. It is often desirable for naval attachés to visit foreign naval yards and stations, and the yards of private firms engaged in government work. These visits are on a basis of complete reciprocity, and definite rules are drawn up by each government regulating the visits. In the United States, application is made by the attaché to the Secretary of the Navy through the Office of Naval Intelligence. Commandants of stations afford as liberal opportunities for visits as the interests of the United States will permit. The naval attaché also acts as agent for the Navy Department abroad in the purchase and inspection of materials.

The Commercial Attaché

The commercial attaché is likewise attached to the mission. He is virtually a representative of the Department of Commerce, and is designated by the Secretary of Commerce. His duties have to do with the collection of information which will throw light on foreign commercial and economic situations, especially as regards markets. The commercial attaché is engaged in trade promotion abroad. His inclusion on the diplomatic list and residence at the mission have greatly facilitated his work. The commercial attaché duplicates in a sense the work of the consul. Arrangements looking to the prevention of this duplication are described elsewhere.

10. *Union of Diplomatic and Consular Functions; superadded con-*

sular office.—Under the instructions of the Department of State, when the office of consul-general is added to one of diplomatic rank, the diplomatic rank is regarded as superior to and independent of that of the consular rank. The officer follows the consular regulations in regard to his consular duties and official accounts, and keeps correspondence in one capacity separate from correspondence in the other. So far as the United States is concerned, the diplomatic function of a consular officer is recognized only when he bears a special letter of credence addressed to the Secretary of State; and conversely, a consular officer of the United States, even when left in the custody of a legation, has no diplomatic rank, functions, or immunities, unless he be expressly accredited to the minister of foreign affairs. Some governments refuse to recognize the union of consular with diplomatic functions. For this reason President Cleveland recommended the abandonment of the superadded title of consul-general at all missions. Where objection is made, the vice-consul-general or vice-consul, if there be one, may be put in charge of the consular work.

11. *Non-diplomatic Missions.*—Sometimes missions of a non-diplomatic character are sent abroad. In 1861 Secretary of State Seward sent some gentlemen to Europe on a confidential and secret mission. They were directed to influence public sentiment in respect to the Civil War. They could not deal with foreign governments directly, nor could they assume diplomatic functions. In 1902 William Howard Taft, then Civil Governor of the Philippines, was sent by Secretary of War Elihu Root to ascertain the opinion of the Vatican with respect to the purchase by the government of the lands of the religious orders of the islands. Under his instructions Mr. Taft was to discover what church authorities had the power to sell the lands, and to reach a basis of settlement satisfactory to such authorities and to the Philippine government. His mission was not "in any sense diplomatic in its nature," but was "purely a business matter of negotiation" by him "as governor of the Philippines for the purchase of property from the owners thereof, and the settlement of land titles, in such manner as to contribute to the best interests of the people of the islands." An American Bishop of the Catholic Church arranged for an audience, and Mr. Taft was duly received by the Pope. He then entered into communication with Cardinal Rampolla, papal Secretary of State. His dispatches were borne by Major Porter of the Judge Advocate's Bureau of the United States Army, who had joined in the mission. The Secretary of War gave new instructions as they were needed. The Holy See agreed to send an apostolic delegate to

Manila to treat with the local government. The purchase of these lands was authorized by the Congress on July 1, 1902, and the Philippine Commission was authorized to issue bonds for this purpose.[5]

12. *Self-constituted Missions.* Dr. George Logan, an eminent citizen of Philadelphia, went to France in 1798, with the ostensible purpose of following certain scientific experiments, but in the main of preventing war between the United States and France, and, if possible, improving the relations of the countries generally. He interviewed Talleyrand and members of the Directory, and favorably impressed the French journals. His interference in international affairs was condemned by Washington and particularly resented by Pickering, Secretary of State. On January 30, 1799, Congress passed the so-called "Logan Act," which was designed to prevent the assumption by unauthorized persons of the function of negotiator. The act follows:

> Every citizen of the United States, whether actually resident or abiding within the same, or in any foreign country, who, without the permission or authority of the government, directly or indirectly, commences or carries on any verbal or written correspondence or intercourse with any foreign government, or any officer or agent thereof, with an intent to influence the measures or conduct of any foreign government, or any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the government of the United States; and every person, being a citizen of, or resident within, the United States, and not duly authorized, who counsels, advises, or assists in any such correspondence, with such intent, shall be punished by a fine of not more than five thousand dollars, and by imprisonment during a term not less than six months, nor more than three years; but nothing in this section shall be construed to abridge the right of a citizen to apply, himself or his agent, to any foreign government or the agents thereof for redress of any injury which he may have sustained from such government or any of its agents or subjects.

III. The Appointment of Diplomatic Officials

The Power to Create Diplomatic Offices and Agencies.—The diplomatic agents of the United States are created, first by interna-

[5] Judge Simeon E. Baldwin commented thus on the Taft mission: "The whole proceeding . . . will rank in the history of international law as an anomalous one. . . . It was, from first to last, to be classed in form as a military incident of a temporary state of hostilities; and yet it was, from first to last, at bottom, the attempt of the civil authorities of the United States on one hand and the Pope on the other to make a permanent settlement of a matter essentially pertaining to matters of civil government."

tional law, which is binding on the courts of the country; second, by the Constitution of the United States; third, by the Congress of the United States; fourth, by the treaty-making power; and fifth, by the President of the United States.

The diplomatic offices by international law have resulted from custom and practice. The rules of the Congress of Vienna regulating diplomatic grades and determining the relative rank and precedence of diplomatic representatives, have already been referred to. These rules have the effect of the public law of Europe, and may be regarded as representing substantially the status of international law on the subject. The fundamental law in regard to the creation of diplomatic offices is the Constitution itself. The Articles of Confederation vested in Congress the power to receive and send diplomatic representatives. In spite of the restriction of this privilege to the Congress, the weakness of the Articles of Confederation as an instrument for the purposes of carrying on the usual international relations of the country is too obvious for comment here. The Articles of Confederation referred only to ambassadors. The constitutional designation included "ambassadors, and other public ministers and consuls." These officials are referred to in two places in the Constitution: first, the clause which authorizes the President, with the advice and consent of the Senate, to appoint ambassadors and other public ministers and consuls; and second, the clause which authorizes the President to receive ambassadors and other public ministers and consuls accredited by foreign governments to the United States. The term "public ministers" appearing in the Constitution refers definitely to a class of officials created by constitutional and by international law. International law and American constitutional law, then, are the two main sources of authority which have created diplomatic offices. The power of Congress to create diplomatic offices and agencies springs from the constitutional authorization to pass all laws necessary and proper for carrying into execution the power of any officer or department of the government. Congress may, therefore, establish any agencies or instrumentalities which it deems necessary and proper to give effect to the powers delegated to the departments of government by the Constitution.

According to Chief Justice Marshall, in the celebrated case of *McCulloch versus Maryland:*

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that

end, which are not prohibited, but which consist with the letter and spirit of the constitution, are constitutional.

The power of Congress, therefore, to create any agency or instrumentality necessary and proper for the exercise of executive power is unquestioned and extends to the conduct of foreign relations.

The treaty-making power of the United States is vested in the President and Senate. When a treaty is under consideration, the President may, with the advice and consent of two-thirds of the senators present, make treaties with foreign powers. It is within the scope of the treaty-making power to establish offices and agencies of a diplomatic character. If the instrumentality established under a treaty is of an international character and is not contrary to the provisions of the Constitution, its creation is a proper exercise of the treaty-making authority. Indeed, to limit the scope of treaty-making to the extent of preventing the creation of diplomatic offices would be to deprive an international convention of its chief value.

The President of the United States is not, under the Constitution, vested with the power to create diplomatic offices and agencies. In the Constitutional Convention it was urged by James Madison that the President be authorized to appoint officers to posts which had not been previously created by the legislature. Accordingly, he suggested that the President's appointing power extend to "offices" rather than to "officers." His suggestion was approved by the convention. Elbridge Gerry took an opposite view and urged that no officer be appointed save to posts created by the Constitution or by law. This motion was lost. It is now the practice of the President to delegate executive authority to persons who do not hold posts created by Congress. The President's authority is limited to the creation of subordinate executive agencies. He cannot take unto himself the right to create offices, for this power is vested exclusively in Congress.

The Power to Appoint Diplomatic Officers and Agents.—As a necessary complement of the right to create diplomatic offices, there follows the right to appoint officers to these posts. In the Constitutional Convention an interesting debate took place in regard to the appointment of ambassadors and other public ministers. Some favored vesting this power in the Senate, others, notably Gouverneur Morris, opposed this plan on the ground that the Senate was too large, too irresponsible, and entirely too much subject to intrigue. It was finally agreed that the power of appointing ambassadors and other public ministers and consuls should be vested in the President "by and with

the advice and consent of the Senate." This authority extends to all other officers of the United States whose appointments are not otherwise provided for in the Constitution and which shall be established by law. Congress may, by law, invest the appointment of such inferior officers as it thinks proper in the President alone, in the courts of law, or in the heads of departments. It appears, therefore, that the power to appoint diplomatic officers and agents flows from the Constitution itself, from acts of Congress, and from the inherent power of each department of the government to appoint its subordinates through the application of the principle of the separation of powers, and of departmental independence.

It was the opinion of Attorney-General Caleb Cushing, in 1855, that the President, under the Constitution, could appoint diplomatic agents of any rank, at any place, and at any time, subject to the constitutional limitations in respect to the Senate. Moreover, it was his view that the authority to make such appointments was not derived from, and could not be limited by, any act of Congress, except insofar as appropriations of money were required to provide for the expenses of this branch of the public service. Essentially, therefore, the power to appoint rests with the President.

The appointment to office consists, in the first place, of nomination by the President to the Senate; and in the second place, of the confirmation of the appointment by the Senate. Confirmation means the granting of "advice and consent" of the Senate as provided in the Constitution. A third duty devolves upon the President of the United States. Before the appointment is complete, the commission must be signed by the President. Generally speaking, however, the third step is purely a ministerial act, while the first two steps are discretionary, first with the President and second with the Senate.

Grades in the Foreign Service.—The Constitution in mentioning "public ministers" has comprehended all grades and ranks of diplomatic officers. For a number of years the power of the President to determine grades of the foreign service under international law and by treaty agreement was unquestioned. Secretary of State Jefferson, in an opinion of April 24, 1790, declared that the Senate, while it might negative the person to be appointed to a foreign mission, would not have the right to negative the grade which the President might think expedient to use in a foreign mission. On March 1, 1885, a law of Congress provided that from and after the end of the fiscal year, the President of the United States should, by and with the advice and consent of the Senate, appoint representatives of the grade

of envoys extraordinary and ministers plenipotentiary to certain specified countries. A specific annual salary was provided for each.

Attorney-General Cushing contended that this legislation was only of a recommendatory and not of a mandatory character. He declared that Congress could not, under any view, require that the President should make removals or re-appointments or new appointments of public ministers at a particular time, or that he should appoint or maintain ministers of a prescribed rank at particular courts. Therefore, this legislation was not to be construed to mean that the President was required to make any such appointments but only to determine what should be the salaries of the officers in case they had been or should be appointed. It is, in effect, a constitutional power to appoint to a constitutional office and, like the power to pardon, is not limitable by Congress.

The Congress of the United States has, however, through legislation, invaded the sphere of the President to determine diplomatic grades. In 1893 an act was passed providing that the President, when advised that any foreign government was represented, or about to be represented, in the United States by an ambassador, was authorized at his discretion to direct that the representative of the United States to such government should bear the same designation. In 1909 it was provided that, "hereafter no new ambassadorship shall be created unless the same shall be provided for by an act of Congress." In pursuance of this act Congress has subsequently authorized the appointment of ambassadors to Spain, Argentina, and Chile; and of envoys extraordinary and ministers plenipotentiary to Paraguay and Uruguay. In 1915 Congress, by law, determined the grades and salaries for secretaries of legation, consuls-general, and consuls, and stipulated that further appointments should be made to the grade and not to a specific country.

By act of May 24, 1924, Congress completely reorganized the foreign service of the United States. A new and uniform salary scale was adopted. The diplomatic and consular branches were amalgamated into a single foreign service on an interchangeable basis. All persons of the diplomatic service below the rank of minister resident are designated as Foreign Service Officers of nine classified grades and of four unclassified grades. Former members of the diplomatic service have been re-classified according to the regulations adopted by Congress under the new designations.

Presidential Agents.—We have already adverted to the fact that the President may delegate certain executive authority to agents, but

that he may not create offices which, under the Constitution, are either provided for by the instrument itself, or reserved to Congress. Nevertheless, the President has often appointed diplomatic agents without the advice and consent of the Senate. These agents are genrally appointed either to negotiate a treaty or to discharge other functions having to do with the President's power to carry on international intercourse.

Such authority was exercised early in the history of our government. By a letter of October 13, 1789, President Washington requested Gouverneur Morris, then in Paris, to go to London as a private agent, and, on the authority and credit of the letter, to converse with His Brittanic Majesty's ministers as to certain matters which concerned the relations of the two countries. At that time neither country was represented in the other by a minister. Deriving his sole authority from Washington's letter, Morris went to London and remained there for a number of months in conference with the British ministers. In 1792 Admiral John Paul Jones of the American Navy was appointed by the President as a commissioner to treat with Algiers. In the year 1816, President Monroe sent three commissioners, Cæsar A. Rodney, Theoderic Bland, and John Graham, on a warship to the revolted colonies to the south to investigate their status and to make recommendations to the President with respect to the recognition of their independence. The Senate was in session when the commissioners sailed, but their nominations were not sent in. In 1818 Henry Clay opposed the inclusion of their expenses in the diplomatic appropriation bill, on the ground that they were diplomatic agents and should have been nominated to the Senate. The difficulty was obviated by placing the appropriation under the head of incidental expenses.

In 1832 Edmund Roberts was sent as special agent to Cochin China, Siam, and Muscat, where he concluded three treaties which were subsequently ratified. In 1846 A. Dudley Mann was sent by President Polk as special agent to some of the German states to conclude treaties. In 1847 Nicholas P. Trist, Chief Clerk of the Department of State, was appointed a commissioner to conclude a treaty of peace with Mexico, which was done on February 2, 1848. In 1849 A. Dudley Mann was appointed by President Taylor as a confidential agent to Hungary, which was at the time in revolt against Austria; and in 1850 Mann was appointed as special agent to Switzerland to conclude a treaty. In 1861 Secretary of State Seward, with the approval of the President and the cabinet, commissioned Archbishop Hughes and Bishop McIlvaine as confidential agents in relation to

questions growing out of the Civil War. In 1881 William Henry Trescot was appointed by the President and commissioned as a special envoy with the rank of minister plenipotentiary to Chile, Peru, and Bolivia, until such time as his authority should be revoked by the President. Mr. Blaine, Secretary of State, in issuing instructions to Mr. Trescot, said: "This commission will not supersede the ordinary duties of the ministers, plenipoteniary and resident, now accredited to those governments, but, as they will be duly informed, all communications and negotiations connected with the settlement of the pending difficulties between Chile, Peru, and Bolivia, so far as this government may deem it judicious to take action, will be transferred to your charge." In due course Mr. Trescot's nomination was sent to the Senate and he was later re-commissioned to serve during the pleasure of the President. In 1887 Thomas F. Bayard, Secretary of State, William L. Putnam of Maine, and James B. Angel of Michigan, were commissioned by the President with full power to meet and confer with the representatives of Great Britain, for the purpose of adjusting questions relating to the Northeastern fisheries, and other issues growing out of this question, and to conclude treaties in regard to them, subject to their final ratification by the President with the advice and consent of the Senate. A treaty was so concluded on February 15, 1888. On May 7, 1888, the majority of the Senate Committee on Foreign Relations rendered an adverse report. The question of the appointment by the President of these negotiators without the advice and consent of the Senate was held "in reserve, for the time being, these grave questions touching usurpations of constitutional powers, or the abuse of those that may be thought to exist on the part of the executive." The minority report upheld the power of the President to select special agents for the conduct of diplomatic negotiations without submitting them to the Senate. Mr. Sherman, the chairman of the Committee on Foreign Relations, concurred in the adverse report and expressed the view that the President alone had the constitutional power to appoint agents to conduct negotiations. "The President of the United States," he declared, "has the power to propose treaties, subject to the ratification of the Senate, and he may use such agencies as he chooses to employ, except that he cannot take any money from the treasury to pay those agencies without an appropriation by law. He can use such instruments as he pleases . . . in my judgment, he has the right to use such means as are necessary to bring about any treaty."

On March 11, 1893, James H. Blount was appointed by President

Cleveland as special commissioner to investigate and report upon the revolution which had overthrown the government of the queen of the Hawaiian archipelago, and upon the sentiment of the people with respect of the existing authority. Mr. Blount was given a letter of credence to Mr. Dole, the president of the provisional government, and was invested with paramount authority with respect to all matters affecting the relations of the United States to the Hawaiian Islands. Certain members of the Senate criticized the method of this appointment. The majority report of the Committee on Foreign Relations, however, upheld the power of the President to appoint agents without the consent of the Senate, and cited precedent as evidence of this authority. Several members of the committee, however, while concurring with the majority report, expressed the view that the diplomatic functions entrusted to Mr. Blount under letters of credence and of instruction, and relating to all matters affecting the relations of the two countries, were unconstitutional and that such appointment should have been submitted to the Senate.

President Woodrow Wilson sent John Lind of Michigan as a confidential agent to the Huerta government of Mexico with the instruction that Huerta be induced to submit to a general election and to withdraw from the election lists himself. This mission was constituted without the authority of Congress, although its results were presented by the President to Congress in special session. In 1919 President Wilson appointed American delegates to the conference at Versailles with authority to negotiate a treaty of peace with Germany. While his failure to share his appointing power with the Senate resulted in ill-feeling, at no time did his opponents in the Senate question his constitutional authority. Senator Lodge, in presenting the German peace treaty to the Senate in 1921, declared that "The President, of course, can appoint anyone he chooses to represent him in a negotiation, because the power of initiating and negotiating a treaty is in his hands."

One of the proposed Senate reservations to the Treaty of Versailles provided that "no citizen of the United States shall be selected or appointed as a member of said commission, committees, tribunals, courts, councils or conferences, except with the approval of the Senate of the United States." While this reservation was finally omitted, its revised form provided that this country should be represented on the League of Nations, and on the agencies established by the treaty of peace, by persons authorized by act of Congress providing for an appointment and defining his powers and duties. While ratification of the Treaty of Versailles eventually failed, Congress definitely had it in

mind to compel the President to share with it the business of appointment of officials to the numerous international administrative and judicial agencies set up by the treaty of peace.

Qualifications for the Diplomatic Service.—From time to time Congress has established by law qualifications for members of the diplomatic and consular services. On May 23, 1822, John Quincy Adams, Secretary of State, informed Mr. D. Forest that his claim to be received in the character of "chargé d'affaires" from Buenos Aires could not be recognized on the ground that the President did not think it proper to receive as invested with the privileges peculiar to the diplomatic agents of foreign powers a person who was a native citizen of the United States and domiciliated in it. In 1855 Congress enacted "that the President shall appoint no other than citizens of the United States . . . as envoys extraordinary and as ministers plenipotentiary, . . . consuls or commercial agents." Other acts of Congress have included the same provision. It was the opinion of Attorney-General Cushing that these congressional provisions could not bind the President in the matter of appointment.

On September 19, 1879, Secretary of State Evarts declared that the American Government objected to receiving a citizen of the United States as a diplomatic representative of a foreign power. On March 16, 1891, Secretary of State Blaine, in replying to an inquiry whether the government of the United States would object to the appointment of Mr. E. Spencer Pratt, a citizen of the United States, as Persian minister at Washington, declared that "The unbroken rule of this government forbids the extension of diplomatic immunities and the extra-territorial rights to one of its own citizens by recognizing him as a resident envoy of another sovereign power." Similarly, the government of the United States refused to accept Mr. W. P. Clyde as envoy extraordinary and minister plenipotentiary from the Dominican Republic on the ground of his American citizenship. The practice of the United States, therefore, includes in general the accrediting of American citizens only as diplomatic representatives to foreign governments, and the receiving of such foreign representatives accredited to the American Government as are not citizens of the United States.

It is sometimes the practice of the President to appoint members of the Senate or of the House of Representatives to posts invested with diplomatic functions. Under the Constitution senators and representatives are forbidden to hold any office under the United States or to accept such an office during the time for which they are elected, if the office is created or its emoluments increased during their term of

office. Members of Congress have, however, been nominated to diplomatic posts during their term of office. It seems to be a violation of the spirit of the separation of powers principle. It cannot be denied that the increased use of competent members of Congress versed in foreign affairs and in the business of diplomatic negotiation, will facilitate the administration of foreign affairs committed to the President with the advice and consent of the Senate.

In 1834 Andrew Jackson appointed Andrew Stevenson, then Secretary of the House of Representatives, to be American minister to Great Britain. The Senate, under the leadership of Henry Clay, rejected the appointment on the ground that the three departments of government, in order to preserve the purity of their administration, should be kept independent of, and outside the influence of one another. The more common practice has been to appoint senators and representatives, not to permanent, but to special and temporary posts having special objects in view. President Madison appointed a member of the Senate and a speaker of the House on the commission to negotiate the Treaty of Ghent with Great Britain, and these gentlemen resigned from Congress in order that they might give uninterrupted and exclusive service to the commission. In 1898 President McKinley appointed three members of the Senate to the commission to negotiate a treaty of peace with Spain. Senatorial opposition to the appointment of the members of that body to diplomatic posts took the form of a resolution and a bill disapproving the custom. The resolution and bill did not leave the committee room, but the President was informed of the Senate's displeasure. Three senators were appointed to the Hawaiian commission in 1898. The Senate declined their confirmation, but they served as presidential agents.

President Wilson appointed himself, Secretary of State Lansing, the Honorable Henry M. White, Colonel Edwin M. House, and General Tasker H. Bliss, to the commission to negotiate the treaty of peace with Germany. At the time of the appointment the House of Representatives by a fair majority, and the Senate by a slender majority, were under the control of the Republican Party. The Senate Committee on Foreign Relations was organized under the leadership of Henry Cabot Lodge. The names of these appointees were not submitted to the Senate for confirmation. Senator Lodge, as we have already pointed out, expressly admitted the right of the President to proceed in this manner. However, the criticism of the majority party directed against the President, both within and without the Senate, was due to the fact that he failed to appoint to the commission either

senators from the majority party, or senators from his own party. Many people predicted that a judicious selection of Republican and Democratic senators would have facilitated not only the ratification of the Treaty of Versailles, but also the making of the treaty itself.

President Harding appointed Senators Henry Cabot Lodge and Oscar W. Underwood, respectively majority and minority leaders of the Senate at the time, former senator Elihu Root, and Secretary of State Charles E. Hughes, to the commission for the negotiation of treaties dealing with the question of the limitation of naval armament and with problems growing out of the Far East and the Pacific areas. The appointment of the Senate leaders of the two leading parties did result in a speedy consideration of the armament, Pacific, and Far Eastern treaties. In future negotiations, where the consent of the Senate is becoming an increasingly important factor because of the growth of democracy in foreign affairs, presidents will likely not be unwilling to include on the commissions to make treaties, some of the men who are charged with the function of ratification.

The question has often been discussed as to the proper length of time during which a diplomatic representative of the United States should remain abroad. Thomas Jefferson, after entering upon the office of Secretary of State, recommended to General Washington the practice of terminating the missions of persons after an absence of six, seven, or eight years. This practice was approved by the President, and Jefferson himself, as President, asserted and applied this rule. He declared that people, too long absent from the United States, even in a diplomatic capacity, return like foreigners and, like them, require a considerable residence here to become Americanized. He declared: "There is no point in which an American, long absent from his country, wanders so widely from its sentiments as on the subject of its foreign affairs. We have a perfect horror at anything like connecting ourselves with the politics of Europe. It would indeed be advantageous to us to have neutral rights established on a broad ground; but no dependence can be placed in any European coalition for that. They have so many other by-interests of greater weight that someone or other will always be bought off."

Colonel E. M. House, in his *Intimate Papers,* disclosed this view in regard to Walter Hines Page, Ambassador of the United States to the Court of St. James's during the World War. Mr. Page, in his dispatches to Colonel House, to the President, and to the Secretary of State, gave unmistakable evidence of being able to see only the British point of view. Colonel House declared that he, Page, could see only

one side of a question and recommended to the President that he be brought to the United States for thirty or forty days in order that he might discover for himself the opinion of the American people, and the difficulties of the Wilson administration with respect to the violation by Great Britain of American neutral rights. While a professional diplomat should renew his acquaintance with the country at frequent intervals, yet the balance seems to be on the side of a permanent diplomatic service, including the superior grades.

The higher grades of the diplomatic service have been regarded with some justification as political appointments within the discretion of the President. Naturally, he will appoint to the important diplomatic posts abroad men who are in sympathy with his foreign policies, and who in their official administration and in their private intercourse will further their application. The leading states of Europe, to a far greater degree than the United States, look upon the diplomatic service, including the higher grades, as a profession, and while men are transferred from post to post, yet they continue in the foreign service of those countries irrespective of changes in the ministry or government.

Diplomatic Functions.—The functions of the diplomatic representatives of the United States are too wide and varied for precise and detailed description here. They have to do in general with promoting, safeguarding, and defending the interests and the good name of the United States abroad. It is indeed a function worthy of our ablest citizens, and one to which they should address themselves with energy, honesty, and with a keen sense of responsibility. It is the business of our representatives, through ordinary intercourse, to develop free relations with other members of the family of nations. The ambassador, while limited by the nature of his office and by the instructions of the President and of the Secretary of State, is nevertheless something of a crusader. It is his function to discover common interests between the country he represents and the country to which he is accredited, and, having discovered them, to protect and encourage them. It is an important duty of the diplomatic service to secure for the United States fair treatment in all matters of commerce and trade, and to provide adequate protection for the persons and property of American citizens in foreign countries. The diplomatic representatives will secure a proper degree of national protection for the American citizens domiciled or sojourning in a foreign country. The faithful diplomat will be on the alert to discover any designs, motives, or alliances inimical to the interests of the United States or tending to

impair its security. They will be on guard to allay foreign discontent or dissatisfaction with American policies, and to dissipate the effects of anti-American propaganda.

The diplomatic representative is the agent of the President charged with the administration of his foreign policies abroad. He is, therefore, in a very real sense, a political official, and through him alone can the representations of his government be disclosed to a foreign office. The many and varied duties of a diplomat are admirably set forth by Walter Hines Page in the following terms:

If you think it's all play, you fool yourself; I mean this job. There's no end of the work. It consists of these parts: Receiving people for two hours every day, some on some sort of business, some merely to "pay respects"; attending to a large (and exceedingly miscellaneous) mail; going to the Foreign Office on all sorts of errands; looking up the oddest sort of information that you ever heard of; making reports to Washington on all sorts of things; then the so-called social duties—giving dinners, receptions, etc., and attending them. I hear the most important news I get at so-called social functions. Then the court functions; and the meetings and speeches. The American Ambassador must go all over England and explain every American thing. You'd never recover from the shock if you could hear me speaking about Education, Agriculture, and observance of Christmas, the Navy, the Anglo-Saxon, Mexico, the Monroe Doctrine, Co-education, Woman Suffrage, Medicine, Law, Radio-Activity, Flying, the Supreme Court, the President as a Man of Letters, the Hookworm, the Negro—just get down the Encyclopædia and continue the list! I've done this every week-night for a month, hand running, with a few afternoon performances thrown in. I have missed only one engagement in these seven months; and that was merely a private luncheon. I have been late only once. I have the best chauffeur in the world—he deserves credit for much of that. Of course, I don't get time to read a book. In fact, I can't get time to keep up with what goes on at home. To read a newspaper eight or ten days old, when they come in bundles of three or four—is impossible. What isn't telegraphed here, I miss; and that means I miss most things.

I forgot, there are a dozen other kinds of activities, such as American marriages, which they always want the Ambassador to attend; getting them out of jail when they are jugged (I have an American woman on my hands now, whose four children come to see me every day); looking after the American insane; helping Americans move the bones of their ancestors; interpreting the income-tax law; receiving medals for Americans; hearing American fiddlers, pianists, players; sitting for American sculptors and photographers; sending telegrams for property owners in Mexico; reading letters from thousands of people who have shares in estates here; writing letters of introduction; getting tickets to the House Gallery; getting seats

in the Abbey; going with people to this, that and t'other; getting tickets to the races, the art-galleries, the House of Lords; answering fool questions about the United States put by Englishmen. With a military attaché, a naval attaché, three secretaries, a private secretary, two automobiles, Alice's private secretary, a veterinarian, an immigration agent, consuls everywhere, a despatch agent, lawyers, doctors, messengers—they keep us all busy. A woman turned up dying the other day. I sent for a big doctor. She got well. As if that wasn't enough, both the woman and the doctor had to come and thank me (fifteen minutes each). Then each wrote a letter! Then there are people who are going to have a Fair here; others who have a Fair coming on at San Francisco; others at San Diego; secretaries and returning and outgoing diplomats come and go (lunch for 'em all); niggers come up from Liberia; Rhodes Scholars from Oxford; Presidential candidates to succeed Huerta; people who present books; women who wish to go to court; Jews who are excited about Rumania; passports to sign; peace committees about the hundred years of peace; opera singers going to the United States; artists who have painted some American portraits,—don't you see?

The Reception of Diplomatic Officials.—The Constitution of the United States has vested exclusively in the President the power of receiving ambassadors and other public ministers. The intention of the framers of the Constitution was not to invest the President with the important power of recognizing foreign governments through the reception of diplomatic agents, but rather to discharge the ceremonial duties usually extended to newly accredited diplomatic representatives. The power to receive, however, has become one of the unmistakable evidences of the power to recognize.

When an American diplomatic representative has arrived at his post, it is his duty to obtain, through the person actually in charge of the mission, a conference with the Minister of Foreign Affairs of the government to which he is accredited, in order that he may arrange for an official reception. He also addresses a similar note to the Minister of Foreign Affairs communicating the fact of his appointment and his rank, and requesting the designation of a time and place for presenting his letter of credence. A copy of the letter of credence is retained in the archives of his mission as a matter of record. When the letter of credence has been presented, the newly accredited diplomatic representative makes a brief address pertinent to the occasion, written and spoken in English. Before his audience or reception is granted, the representative must furnish to the Minister of Foreign Affairs a copy of his proposed address, in order that a suitable reply may be prepared. A copy of the address and of the reply must be sent to the Department of State.

The practice of President Monroe in receiving diplomatic representatives has been described by John Quincy Adams, then Secretary of State, in the following words:

> At these audiences (those of President Monroe with foreign ministers at Washington) the President observes the usual forms practiced by European sovereigns on similar occasions. That is, he receives them standing, dressed in a half military uniform or a full suit of black. The ministers are in full court dress. He stands in the center of the drawing-room, and I accompany them, keeping the right hand. On receiving the letter, the President hands it, unopened, to me. . . . The President has a general answer to the short addresses which the ministers make in delivering these letters, namely, "that the United States takes a great interest in everything that concerns the happiness of their sovereign," with very little variation adapted to each particular case. He makes no other conversation.

IV. The Termination of Diplomatic Missions

Resignation of Ministers.—According to the instructions issued to diplomatic officers of the United States, a civil officer has the right to resign his office at pleasure. The resignation takes effect, in the case of most civil officers, upon the receipt of the resignation by the President. In the case of diplomatic officers, a date is fixed when the resignation shall be deemed to take effect. If one resigns while at his post of duty, the resignation takes effect, unless otherwise indicated, when the officer is relieved by his successor. Resignation while on leave in the United States takes effect from the date of its acceptance. Resignation while the incumbent is absent on leave but not in the United States takes effect when he is relieved by his successor. A diplomatic agent may tender his resignation to take effect at the expiration of his leave of absence. The resignation will be so accepted unless the interests of the service demand that the vacancy be sooner filled. Death has the effect of automatically terminating a diplomatic mission.

Recall of Diplomatic Representatives.—The usual method of terminating a diplomatic mission is through the recall of the incumbent by the President. This the President accomplishes at his pleasure during a session of the Senate by nominating to that body the officer's successor. When the appointment has been confirmed and the commission delivered, the incumbent ceases to hold his diplomatic post, although it is his duty to remain at his post until duly relieved. His official functions end when he has been notified of the appointment of his successor by the Department of State or by the exhibition of

his successor's commission. A diplomatic officer may be recalled while on leave of absence, and his office terminates upon the receipt by him of official notification of the fact. When a retiring diplomatic representative is about to be relieved of his duties, it is his duty to secure an audience of leave-taking with the Minister of Foreign Affairs of the government to which he is accredited. As in the case of an audience of reception, he should furnish the Minister of Foreign Affairs with a copy of his proposed address in order that a suitable reply may be drafted. A copy of the address of leave-taking and of the reply must be sent to the Department of State.

Request for Recall.—Secretary of State Jefferson declared in 1792 that as a general rule no nation had a right to keep an agent within the limits of another without the other's consent. International comity forbids even the appearance of coercing a friendly government to retain a foreign representative declared by it to be *persona non grata.* The usefulness of such a representative is unquestionably impaired by the hostility which the government to which he is accredited will exhibit toward him. The retention of such a minister is always personally embarrassing to himself, and his mission if continued will be an unfruitful one. Where the mission has become personally or officially unacceptable to the receiving government, it is a common practice for the Department of Foreign Affairs to request the minister's recall and for the corresponding authority of the minister's country to honor the request. A celebrated case is that of Señor Dupuy de Lôme, Spanish minister at Washington just before the outbreak of the Spanish-American War. Señor Dupuy de Lôme had written to a Spanish journalist an unfortunate letter, which was abstracted from the mails at Havana by a Cuban sympathizer. It commented, among other things, upon the annual message sent by President McKinley to Congress, and described the President as "weak and a bidder for the admiration of the crowd, besides being a would-be politician, who tries to leave a door open behind himself while keeping on good terms with the jingoes of his party." The letter further intimated that Spain should take up, even if only for effect, the question of commercial relations. Upon the publication of the letter, such a negotiation had already been commenced. The minister admitted his authorship of the letter, and the minister of the United States at Madrid was instructed to ask for his immediate recall because the letter contained "expressions concerning the President of the United States of such character as to end the minister's utility as a medium for frank and sincere intercourse between this country and Spain." Señor Dupuy de

Lôme soon resigned as minister and the Spanish Government disclaimed the letter as any representation of official Spanish views.

Refusal to Receive a Diplomatic Representative.—A government may express its disapproval of a minister before he is officially sent on his mission, and may refuse to receive a representative upon his arrival at the seat of government. One of the most difficult cases of this category was that of Mr. A. M. Keiley. In 1885 the Italian Government objected to receiving him as minister from the United States on the ground that he had made speeches in the United States at Roman Catholic meetings supporting resolutions prepared by bishops of the diocese, one of which protested against alleged interferences by King Victor Emmanuel in the affairs and rights of "the head of the Church on earth." Mr. Keiley resigned his commission, and the government of the United States recognized "the full and independent right" of King Victor Emmanuel to decide the question of the personal acceptability to him of an envoy from another government.

In 1885 Mr. Keiley was named by President Cleveland as minister of the United States at Vienna. The Austrian minister to the United States informed the Secretary of State that the appointment of Mr. Keiley would be unacceptable and that "the position of a foreign envoy wedded to a Jewess by civil marriage would be untenable and even impossible in Vienna." Mr. Bayard, Secretary of State, declared that the objection to an envoy on the ground that his wife was supposed to be a member of a certain religious sect could not be countenanced but must be emphatically and promptly denied. He further observed that under the Constitution no religious test could be required as a qualification of any office or public trust, and that no law could be passed respecting the establishment of a religion or prohibiting the free exercise thereof. Moreover, a doctrine "so destructive of religious liberty and freedom of conscience, so devoid of Catholicity, and so opposed to the spirit of the age" could not be accepted by the family of nations, or by the people of the United States, or by any administration representing their sentiments. The reconsideration of Mr. Keiley's appointment was requested. Austria-Hungary replied that Mr. Keiley was unacceptable on the ground that he had formerly been guilty of a lack of political tact in consequence of which a friendly power had refused to receive him, and upon the ground that the condition of his domestic relations would prevent that reception of him by Viennese society which was desirable for the representative of the United States. Mr. Bayard then admitted "the right of a foreign power to exercise its own high and honorable discretion as

to the representation of an envoy from this government." The Austrian Minister of Foreign Affairs declined to receive Mr. Keiley and he resigned his mission.

President Cleveland, in his annual message to Congress of December 8, 1885, declared that he could not acquiesce in the reasons advanced by the Austro-Hungarian Government against the personal acceptability of Mr. Keiley. It was in effect, he declared, an application of a religious test as a qualification for office, prohibited by the Constitution, and was an abandonment of a vital principle of our government.

Dismissal of a Minister.—The most peremptory and unpleasant method of terminating a mission is by the direct dismissal of a minister by the government to which he is accredited. Sometimes the accrediting government is given an opportunity to recall such a minister and, upon refusal to do so, dismissal by the receiving government is the usual result. Again, the receiving government may directly dismiss a minister by giving him his passports without communication of his unacceptability to the Minister of Foreign Affairs of his own government. Where diplomatic relations between governments have reached the stage of an open rupture and their severance has been decided upon, the mission is usually terminated forthwith by handing the minister his passports.

In 1888 Lord Sackville was dismissed by President Cleveland on account of his "unpardonable conduct . . . in his interference by advice and counsel with the suffrages of American citizens in the crisis of the presidential election then near at hand, and also in his subsequent public declarations to justify his actions, super-adding impugnment of the Executive and Senate of the United States in connection with important questions then pending in controversy between the two governments." The offense was described by President Cleveland as a grave one involving disastrous possibilities to the good relations of the United States and Great Britain, constituting a gross breach of diplomatic privilege, and an invasion of the purely domestic affairs, and essential sovereignty of the government to which the envoy was accredited." Lord Salisbury, British Secretary of State for Foreign Affairs, in reply to Secretary Bayard's request for Lord Sackville's recall, admitted that a government might by the law of nations and international usage make such a demand, but that the same law and usage entitled the government to which such a request was made to decline to comply with it. He declared that it necessarily rested with the British Government to determine whether the com-

plaint against the British diplomatic agent was just, and whether the dignity and interests of Great Britain would be best consulted by withdrawing him or maintaining him at his post.

In 1915 the Austro-Hungarian ambassador, Mr. Dumba, proposed in a letter addressed to his government and entrusted to an American citizen traveling to Europe under an American passport, that plans be put under way to incite strikes in American munitions plants. Secretary Lansing demanded his recall on September 8, 1915, on the ground that he had violated international propriety in a flagrant manner through the abuse of an American passport, and that he had planned a conspiracy to cripple the legitimate industries of the American people and to interrupt their trade. Acquiescence by the Austro-Hungarian Government in this request prevented an immediate dismissal.

V. The Rights and Duties of Ministers

The Minister's right to Protection.—In order to facilitate diplomatic intercourse and to make possible the success of a mission, nations have reciprocally agreed, under international law and through treaties, to afford complete protection to representatives accredited to them. A minister is by municipal law and by international law entitled to protection of his person and reputation. A law of the United State makes punishable an act by anyone who in any manner "offers violence to the person of a public minister, in violation of the law of nations." It is the duty of a state to shield representatives accredited to it from insult as well as from personal violence. Under the act of June 15, 1917, one who falsely pretends to be a diplomatic, or consular, or other official of a foreign government duly accredited to the United States, with intent to defraud such government or any person, and in this pretending character obtains or attempts to obtain from any person or foreign government, any paper, money, document, or other thing of value, is subject to fine or imprisonment or both.

While the person and reputation of a minister are inviolable, such immunities as extend to him flow also to his house. His household and retinue enjoy the same protection as he himself enjoys; his domicile and property receive a peculiar protection, and to interfere with them is a crime against the state and against the law of nations.

The Right of Official Communication and Transit.—The United States, under the law of nations, permits the right of transit to a dip-

lomatic officer to or from his post of duty, by sea or through the national domain on land or water, when such representative is not accredited to the United States. While in transit through this country on his way to his station he is exempt from service of process in a civil suit. As a matter of courtesy, but not of right, he is generally exempt from the payment of customs duties. When transit through a country becomes sojourn or residence, and this is unacceptable to the government through whose territory the minister is passing, the usual exemptions may be withdrawn.

One of the rights of legation is that of free and uninterrupted official communication. An official accredited to a government is entitled to make use of the usual modes of communication. Messages may be sent in cipher. This practice may be restricted by a belligerent state but not unreasonably so. The United States has held to the position that it maintains the right of communication for its diplomatic officials accredited to belligerent governments when the United States is at peace. Under such circumstances, however, the American minister must have a due regard for the safety of the state of his residence and must not abuse this privilege. A state may demand inviolability of its official correspondence either as a neutral or belligerent. Couriers and dispatch bearers may be employed by diplomatic representatives, and persons so employed are immune from arrest and are privileged persons within the limits of their official duties.

Rights of Worship and of Display.—A minister may within his legation assert the right of worship for himself and those of his fellow-countrymen who profess his faith, within the limits of the like privilege conceded in the country of his sojourn to other foreign legations. Freedom of worship is generally conceded to foreign legations even in countries which maintain a religious establishment different from that of the diplomatic agent's country. Religious services should be conducted in such a manner as not to bring the religion into disrepute or to be in any manner offensive to the prevailing creed of the inhabitants.

A minister can probably display the flag of his country from his official residence without protest from the government to which he is accredited. An official shield is usually placed above the principal entrance of the diplomatic representative's residence, or in the offices of the mission, when these are separate from his residence, with a short flag staff set above the shield, on which to display the flag of the United States on occasions of special ceremony. Secretary of State Clay declared in 1827 that if any diplomatic agent thought it proper

to raise the flag of his country there was probably no law to prevent him from doing so.

Jurisdictional Immunities. 1. *Exemption from Judicial Process.*—Under international law a diplomatic officer is exempt from local jurisdiction and, therefore, may not be tried or prosecuted criminally or civilly in the local tribunals of the government to which he is accredited. It is to be remembered that his immunity is an exemption from process rather than an exemption from law. Under the Revised Statutes of the United States, any judicial process under which the person of a public minister or foreign prince authorized and received as such by the President, or any personal or domestic servant of such a minister is arrested or imprisoned, or any of his chattels or goods are distrained, seized, or attached, is declared to be void. Moreover, every person suing out or executing such a process is declared to be a violator of the law of nations and a disturber of the public repose, and as such liable to imprisonment for not more than three years and to the payment of a fine at the discretion of the court. A representative accredited to a foreign government cannot be sued, arrested, or punished by the law of that country. He cannot waive his privilege except with the consent of his government, for it belongs to his office and not to himself. The diplomatic privilege cannot be used to allow a representative of the United States intentionally to evade just obligations.

2. *Giving of Testimony.*—Under American instructions to diplomatic officers, a diplomatic representative cannot be compelled to testify before any tribunal in the country of his sojourn, nor can he divest himself of this immunity without the consent of his government. If the interests of justice require him to testify in a tribunal, he may upon application to the Department of State, and at its discretion, receive a waiver of this privilege. One Mr. Eddings, Secretary of the American Embassy at Rome, inquired whether he should give testimony against a pickpocket at the request of the Italian court. The Department of State replied that his testimony might be given on terms consistent with his representative dignity, and that unless an examination in open court was indispensable, the giving of his personal deposition at the Embassy was preferable. It was subsequently reported that his deposition was to be taken at the Embassy by the judge before whom the case was pending.

3. *Property.*—The American diplomatic instructions provide that immunity from local jurisdiction extends to a diplomatic representative's dwelling house and goods, and to the archives of the mission. These cannot be entered, searched, or distrained under process of local

law or by the local authorities. Real or personal property unconnected with the mission and aside from that which pertains to a representative as a minister, is subject to local laws.

4. *Persons Entitled to Exemptions.*—The head of the mission, like the head of the state, enjoys an immunity from local jurisdiction. The Revised Statutes of the United States provide that the personal immunity of a diplomatic representative extends to his household and especially to his secretaries. The diplomatic representative customarily furnishes to the local government a list of the members of his household, including his hired servants, together with a statement of the age and nationality of each. When requested, this should always be given. The secretary of an embassy or legation is especially entitled as an official person to the privileges of the diplomatic corps as regards exemption from local jurisdiction. The wife, children, parents, and other members of the minister's family, such as brothers and nieces, and his household guests, enjoy the minister's exemption while living with him. This extends also to the family and guests of the secretary of a mission. Members of the minister's retinue such as servants and domestics generally share their minister's immunity during their period of service; but this exemption is one of courtesy and not of right.

5. *Taxes.*—The United States reciprocates in exempting from general taxation the property owned by a foreign government and occupied as its mission. However, such exemption does not extend to local assessments, such as water rent, except by express agreement. A minister may not be charged a personal tax on the ground that it interferes with the uninterrupted exercise of his functions. The extent to which members of his retinue share in this exemption depends upon the mode of levy and collection. The regulations of the Treasury Department allow the privilege of free entry and exemption from examination of baggage and effects of the following officers, their families, and suites: foreign ambassadors, ministers and chargés d'affaires, secretaries, and naval, military, and other attachés at embassies and legations accredited to the United States whose governments extend reciprocal privileges to American officers of similar grade. In the United States the privilege of free importation of goods at any time is extended to the diplomatic officials of foreign governments.

6. *Police Regulations.*—A diplomatic representative is not excused from the law. The net result is that the application of law and of process is lifted in his case. According to John Bassett Moore, "the

theory of diplomatic immunity is not that the diplomatic officer is freed from the restraints of the laws and exempt from the duty of observing them, but only that he cannot be punished for his failure to respect them. The punitive power of the state cannot be directly enforced against him.'' It is the duty of the diplomatic officer, however, to respect the laws of the country to which he is accredited, and to observe the usual regulations which make for the preservation of public health, safety, and morals. A minister accredited to the United States who continues flagrantly to violate police regulations cannot be punished for such violations, but the cumulative effect would be the termination of his mission.

7. *Diplomatic Asylum.*—Under early diplomatic usage it was the practice of ambassadors to allow the freedom of the embassy to a large number of persons. Many persons enjoying this special protection were fugitives from justice and were oftentimes objectionable characters. It grew into a common abuse of the inviolability of the minister's domicile, and steps were taken by governments seeking to apprehend such fugitives to remove them from the protecting walls of missions. In Europe the practice fell into disrepute at the end of the nineteenth century. The United States has never granted the so-called right of asylum, but the practice still prevails extensively in Latin-American countries. It is the policy of the United States, however, in its relations to the Latin-American countries, not to extend the protection of its diplomatic residences to persons charged with crime or with civil or political offenses. In the celebrated Egan Asylum case President Cleveland expressly disapproved the practice of Mr. Egan, American Ambassador to Chile, in harboring Chilean refugees from justice. He pointed out that the United States could not, under the ill-defined fiction of extra-territoriality, interfere with the usual and ordinary administration of justice in countries to which American ministers were accredited.

The Duties and Obligations of Ministers. 1. *Obedience to Instructions.*—It is the business of a diplomatic representative to obey the instructions of the Department of State insofar as they apply to situations which arise under his administration. The modern means of communication have reduced the discretionary authority formerly vested in diplomatic representatives. No improvement in rapidity of intercourse and communication can displace the tact, judgment, and good sense of a foreign minister of a country. Such means of communication, while serving to diminish his independent judgment in some things, have served to increase it in others. When personal danger

threatens a minister, his own judgment and discretion must decide whether or not he shall quit the country. Under ordinary circumstances he will not do so until instructed, for no minister is supposed to break off diplomatic intercourse without the authority of his government unless a serious indignity has been offered to him as an individual or minister. In such an event he is supposed to proceed upon the presumption that his government, if informed of the facts, would approve his conduct.

2. *Presentations at Court.*—The minister is a medium of presentations of his countrymen at the court of the sovereign to which he is accredited. In the case of any but diplomatic persons, an audience at court is the extension of a courtesy and not a right. The court itself defines and prescribes the qualifications, conditions, and terms on which strangers shall be admitted into its society. American diplomatic representatives, requesting such an audience for American citizens, must comply with such terms and conditions. The occupation or profession of any person so presented may properly be given. The social position of each person presented need not be given, but it is proper to indicate the official positions held by such persons at the time or to point out any military, scientific, literary, or political distinctions which they have achieved.

3. *Non-Interference in Politics.*—The diplomatic agents of the United States are advised to abstain from interfering in the domestic affairs of the countries where they reside. This is especially the case where ambassadors are accredited to governments mutable in form and in the persons by whom they are administered. A continued participation in domestic politics would render an agent unacceptable to the receiving government and would make his mission a failure.

Foreign agents of the United States, residing where insurrections are taking place, must avoid any interference in the struggle and must not acknowledge insurgent authorities until the latter have been permanently established.

4. *Speeches and Presents.*—Diplomatic and consular officers of the United States may not correspond with newspapers, nor should they make public addresses anywhere except on festal occasions to which they may be invited in the country of their official residence. In such cases, however, they must not discuss political matters. No minister or consul may make an address to the public, or one which may be published, in any country other than that of his official residence. Mr. Bayard, at the time ambassador to Great Britain, made two public speeches which were regarded as objectionable by the

House of Representatives. In one, he represented the people of the United States as strong, self-confident, and often violent. The President, he said, stood in their midst, and it took a real man to govern them. In the other, he styled protection as a form of Socialism which controlled the sovereign power of taxation, corrupted public life, banished men of independent mind from public councils, and lowered the tone of national representation. Protection, he said, was enjoying an insatiable growth in his own country. In December, 1895, a motion was made in the House of Representatives to impeach Mr. Bayard. The Committee on Foreign Affairs recommended a milder form of procedure, and on March 20, 1896, a resolution of censure was adopted by a vote of 180 to 71.

The Constitution of the United States provides that any person holding any office of profit or trust under them (the United States) shall not, without the consent of the Congress, accept any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state. The Revised Statutes of the United States expressly forbid diplomatic or consular officers to ask or accept, for themselves or any other person, any of the favors mentioned above. The constitutional and statutory prohibitions include everything that can be the subject of a gift.

5. *Support of Private Interests.*—The diplomatic agent must guard against actively supporting the private interests of an American citizen. This is regarded as not within the dignity and decorum of his position. Where the interposition of a diplomatic representative is asked to aid in the collection of claims against a government, the request must be placed before the Department of State, and the minister must await his instructions, unless the gravity of the claim or the pressing necessity for action requires discretionary procedure on the part of the minister.

6. *Joint Action.*—The policy of the United States is to act separately in the presentation of claims even when they arise from an act equally invading the common rights of American citizens and the subjects of another state residing in the country to whose government complaint is made. The United States will make, when its interests dictate, a coincident and even identical representation with other powers for a common cause of complaint, but it is opposed to joint presentation. The reason uniformly assigned is that a joint demand for redress carries with it the idea of a joint enforcement of remedies which might become necessary in case of denial. United action takes

place only in case of express instructions from the Department of State.

7. *Mediation or Good Offices for Citizens of Third Countries.*— The government of the United States is sometimes requested by friendly powers to authorize its diplomatic and consular officials to extend their protection to the citizens of a third power where the latter has no diplomatic representation. This is done with the consent of the country in which the American officials reside, and it is, usually, a temporary arrangement. In the case of Swiss citizens it has been more or less a permanent arrangement. The Department of State merely authorizes its representatives, with their own consent, to extend their good offices. If the function is accepted, with the approval of the Department of State, the diplomatic or consular officer becomes, for the purposes of his mediatorial duties, an agent of the government of the third power. He is responsible to it for the discharge of such duties and for his acts in relation to them. He cannot be considered for this purpose, however, a diplomatic or consular officer of the foreign government. No compensation or present may be accepted for this service without the previous authority secured from Congress.

This system prevailed in Turkey before the abolition of extraterritoriality by the states of Europe under the Treaty of Lausanne. Foreigners enjoyed protection and exemption because of their status as foreigners and because of the solidarity among them. The generic name "Franks" has uniformly been applied to aliens in Turkey for centuries. Such rights and privileges as have been extended to them depended primarily upon their status as such and not on treaty arrangements. One power has often extended its protection to citizens of other countries in Turkey. It has been regarded as an inherent Frankish right and the privilege of every Frank. Every foreigner in Turkey had the right to be enrolled in the protected list of any foreign consulate whether of his nationality or not. The right of extraterritoriality in Turkey was, prior to the Treaty of Lausanne, based upon capitulations rather than upon treaty, and the citizens of nontreaty powers enjoyed the privilege on the same basis as the citizens of treaty powers.

On various occasions the United States has extended the advantages of its good offices to foreign governments in places where the latter has had no representative. This is more generally true in the case of Swiss citizens having no direct Swiss representative to whom

they could appeal. Colonel Frey, Swiss minister to the United States, wrote to Mr. Bayard in 1887 that "a Swiss, by placing himself under the protection of the United States becomes assimilated, in the opinion of the President of the Confederation, while he is under that protection, to a citizen of the United States; his character as a Swiss is, for the time being, not to be considered, and so far as the foreign state is concerned, he is governed by the United States flag." Secretary Bayard replied that there was little or no difference in the assistance rendered the Swiss nation by American representatives over and above that rendered any other nation. He declared, however, that protégés could not, in all cases, be treated as if they were citizens of the protecting country, that a Swiss under such circumstances could not be completely assimilated to a citizen of the United States, and that his character as a Swiss could not be altogether disregarded. The unofficial mediation of the United States, it seems, is a special and limited one for which no responsibility can be assumed. Indeed, if Swiss protégés could be assimilated to the character of American citizens, it would be obligatory upon the United States, in certain instances, to demand that degree of national protection as a matter of right which we deem necessary for all Americans resident abroad.

8. *The Protection of Citizens of Belligerent States.*—After a termination of diplomatic relations by reason of war, it is the practice for states maintaining embassies, legations, or missions in an enemy country, to ask a friendly neutral to take over the work of its diplomatic establishment. This entails not only the transaction of official business for the enemy country, but also the extension of protection to the nationals of the enemy state. When an American diplomatic officer undertakes this function, he acts unofficially. His duties in this respect call into play his utmost resources of mind, of discretion, of energy, and of candor. He must be on his guard that his good offices do not in any way affect or prejudice the official standing of his country as a neutral. If the archives and property of the belligerent state are placed in his keeping, he will demand for it the respect and immunity it would enjoy under the care of the enemy government. During the Great War the United States assumed the embassies and legations of a number of belligerent states. This greatly increased the work and staffs of our foreign missions, and this action, among other things, clearly demonstrated the inadequacy of our foreign establishments in dealing with a sudden great international situation where all the resources of our diplomacy were unexpectedly called into play.

VI. Diplomatic Negotiations

The Position of the President.—The President of the United States, as the national spokesman of the country in foreign policy, and as the responsible executive in matters of administration, is the director of international intercourse. The position of the President in foreign relations was made clear early in our history by the first Secretary of State, Thomas Jefferson. In 1793 M. Genêt, French minister to the United States, requested an exequatur for a consul whose commission was addressed to Congress. Jefferson responded that the President was the only channel of communication between the United States and foreign nations, and that foreign nations and their agents should learn from him alone the will of the nation; that whatever he communicated as such was to be regarded as the expression of the nation; that no foreign agent could be allowed to question it or "to interpose between him and any other branch of the government, under the pretext of either's transgressing their functions." Jefferson declined to discuss further the function of the President under the Constitution to admit or exclude foreign agents, and remarked that he merely informed Genêt of the fact by the authority of the President. He returned the consul's commission and declared that the President would issue no exequatur to a consul except upon a commission correctly addressed. It is within the right of a foreign minister to remonstrate with the executive to whom he is accredited with respect to any measures affecting his country, but his remonstrances must be confined to representations directed to the executive. He cannot by an address to the people, either oral or written, attempt to defeat a pending measure or to reverse a position which has already been decided upon.

Conversely, agents of the United States in foreign countries must respect the authority of the country of their residence charged by its constitution or fundamental law with the direction of its foreign relations. Mr. Calhoun, Secretary of State, informed Mr. Holmes in 1844 that the American Government could not apply to Yucatan authorities for redress of grievances which took place in that province. Yucatan, he objected, constituted only a part of the Republic of Mexico, which, in the last resort, was responsible for all injuries which the judicial tribunals might have neglected or might have been incompetent to redress. A scrupulous regard for the constitutional rights and limitations of the government to which he is accredited is expected of each foreign minister.

Executive Communications to the Congress.—The messages of the President to Congress, both annual and special, are communications authorized by the Constitutional provision to the effect that the President shall from time to time communicate to Congress information as to the state of the Union. It is the practice of the President to devote a portion of his message to matters pertaining to foreign affairs, and in the case of special messages often the entire content has dealt with a foreign situation. It is, therefore, purely a constitutional and internal transaction. It is not deemed proper or respectful by the Department of State for foreign powers or their representatives to interfere or even to make these the basis of a diplomatic correspondence. As Secretary of State Marcy indicated to Mr. Herran, Colombian minister, in 1856, "It is not a document addressed to foreign governments."

The debates of the Senate and House of Representatives sometimes turn on questions of international affairs. This is clearly the case in the Senate when the ratification of treaties and the confirmation of diplomatic appointments are in question. It is also the case in the House of Representatives when revenue measures having to do with the Department of State and Foreign Service, or appropriations called for under treaty agreement, are involved. In 1868 Mr. Seward declared in a note to Mr. Yeaman, minister to Denmark, that "it is neither convenient nor customary with the Executive Department to discuss or give explanations concerning the expressions of opinion which are made in incidental debates on resolutions from time to time in either or both of the legislative bodies, at least until they assume the practical form of a law. When they assume that form, they are constitutionally submitted to the President for his consideration and he is not only entitled, but he is obliged, to announce his concurrence or non-concurrence with the will of the legislature." It is, therefore, clearly outside the function of a foreign agent to interfere in the debates or publications of the legislature of the country to which he is accredited. The same rule holds for communications by American foreign agents to the government of the United States, and for the diplomatic correspondence of the Department of State. Such diplomatic correspondence as can be safely released for publication is published annually in a series known as the "Foreign Relations of the United States." The publication of this correspondence is purely a domestic matter and cannot form a subject of discussion between this government and foreign representatives. In 1875 the Turkish minister to the United States complained to Mr. Fish, Secretary of

State, that the correspondence of the Department of State with its consular officers in Tripoli and Tunis was arranged under the head of "Barbary States" instead of "Turkey" in a volume of "Foreign Relations of the United States." Mr. Fish replied that the volume was a communication addressed by the President to Congress and not to foreign governments. The arrangement had no political significance but was one of usage and domestic convenience. The Turkish minister, therefore, could infer from it no tendency to classify Tripoli and Tunis as Barbary States. This classification had been observed by lexicographers, historians, and geographers. In addition, the United States had separate and independent treaties with each, for the execution and observance of which we held them responsible. Therefore, the objection of the Turkish minister was not admitted by the Department of State.

The Department of State as the Diplomatic Channel.—Much precedent both for diplomatic policy and practice has grown out of the relations between Secretary of State Jefferson and M. Genêt, French minister. On August 13, 1793, the French minister addressed a letter to the President of the United States. Mr. Jefferson observed in reply that it was not the established course for the diplomatic representatives residing here to have direct correspondence with the President. The Secretary of State was the organ through which their communications should pass. In 1888 the minister of the Shah of Persia expressed a desire for a private audience with the President. The acting Secretary of State pointed out that official communications of foreign envoys were made through the Secretary of State and not directly to the President, except as to formal, ceremonial acts, the nature of which was first indicated. A time was named at which the minister would be received by the Department of State, and later an audience with the President was given through the usual channel of the Department of State.

Official and Unofficial Communications.—The United States Government is responsible only for official communications and then only for such communications as are addressed directly to a foreign government. An officer of the United States who expresses his views in a private capacity cannot be regarded by a foreign government or its representatives as stating an official opinion. Unofficial views unofficially expressed cannot be regarded as an offense by a government against a friendly state. It is a uniform rule that no officer, civil, military, or naval, may properly carry on an official correspondence with a foreign government except through the Department of State

or its diplomatic representative at the seat of such government. The rules of foreign offices distinguish carefully between official and unofficial correspondence, and although the line of distinction is sometimes difficult to draw, on no point should diplomatic agents be more punctilious than this. On several occasions the President and the Department of State have reminded aliens that their communications can be received only through the minister of their country. It is a rule of practice that the Department of State can receive no communication from subjects of another country on international matters except through the minister of such country. Conversely, American citizens desiring to communicate with a foreign government can do so only through the Department of State, if residing within the United States, and only through the American diplomatic representative accredited to their country of residence, if residing abroad.

Language and Tone of Correspondence.—The English language is employed by American diplomatic representatives in formal written communications to the governments to which they are accredited. In eastern countries, and also in urgent cases in European and American countries, the communications in English may be accompanied by a translation into the language of the country. In any case the English text is to serve as a standard in the ascertainment of the precise meaning of the American diplomatic representative, should a question be raised. It is a general rule of diplomatic intercourse for a diplomatic representative to address communications in his own language to the government to which he is accredited. Requests for translations, however, are regarded as reasonable.

The tone and manner of American diplomatic correspondence has not always been above criticism. Mr. Bayard observed in 1885 that "it is the prerogative and aim of diplomacy to avert disputes, not to foment them." This is especially true with respect to the tone of diplomatic correspondence, much of which inevitably will be in the form of argument. Foreign offices and diplomatic representatives will, to the best of their ability, present their cases in the most favorable light and couch their positions in the most vigorous terms. The negotiator, however, must steadily keep in mind that argument is to persuade and convince, not to drive and coerce. Diplomatic negotiations, like ordinary legislation, must in general result in rational compromises. Objectionable language in a diplomatic paper will often make this desirable outcome impossible. In 1835 Secretary of State Forsyth laid down an admirable rule governing diplomatic agents in their official correspondence: "Facts may be denied, deductions ex-

amined, disproved, and condemned, without just cause of offense; but no impeachment of the integrity of the government in its reliance on the correctness of its own views, can be permitted, without a total forgetfulness of self-respect.''

VII. Diplomatic Ceremonial

Formalities.—The United States Government does not emphasize formalities in its international intercourse, but pursues a consistent policy of attempting to observe those of uniform and convenient application. Mr. Jefferson pointed out to M. Genêt, in 1793, that when formalities were attacked with a view to changing principles, it became material even for the government of the United States to defend them. President Washington, in a letter to the French minister in 1789, declared that he was not disposed to impede the dispatch of business by a ceremonious attention to idle forms; but if rules of proceeding existed which were sanctioned by the common consent of nations and which originated from the wisdom of statesmen, it ill-became a young state to dispense with them altogether without some substantial reason. The French minister was, therefore, reminded that the best practice dictated the conducting of negotiations by writing and through appropriate departments of government, of which the Foreign Department was a definite branch. The United States is willing to send special envoys to attend the funeral of an emperor or the coronation of a king. While observing simplicity and dignity in its international intercourse, the government of the United States refuses to yield, through observance of any formality, that degree of respect and consideration which is due a great and powerful nation.

Rules of Precedence.—The government of the United States has adopted the rules of Vienna which recognize four grades of diplomatic representatives: ambassador, minister plenipotentiary, minister resident, and chargé d'affaires. Precedence is governed by these grades. Within a particular grade, therefore, precedence is determined by the date of the envoy's presentation of his credentials. The minister bearing the oldest commission in each grade takes precedence.

The European practice by general consent is to allow the Pope's legate to take precedence over any member of the same grade in the diplomatic corps. Since the unification of Italy the Vatican has sent nuncios or legates only to governments with which it has had concordats. The states of the Church no longer exist as a temporal power, but papal representatives usually enjoy honorary precedence at courts

where the Vatican maintains representation. The government of the United States maintained diplomatic relations with the states of the Church for a number of years, but in 1868 Congress failed to make appropriations for the support of a mission and the minister was withdrawn. In 1871 President Grant was officially informed of the annexation of the states of the Church to the Kingdom of Italy and of the removal of the capital of that kingdom to Rome. In conformity with established American practice, he recognized the change. The United States has sent no envoy to the Vatican since the states of the Church ceased to exist, nor has it received an envoy from the Pope.

Questions of precedence and ceremony often arise within the ranks of the diplomatic corps itself. Where a foreign representative is not pleased with the place assigned him, he may appeal to the Master of Ceremonies or to the Minister of Foreign Affairs. This is not a suitable question for decision by the Dean of the Diplomatic Body, but in all questions which affect the personal relations of members of the diplomatic corps among themselves, or their social relations to the unofficial community in which they reside, the Dean of the Corps is the proper person to be asked to advise or to decide. These questions cannot be referred to the government of the country represented by the Dean, because the deanship is a personal function limited in its effects to the local diplomatic circle, and does not belong to the diplomatic representative of any particular country.

Official Calls.—The established usage of the country of his official residence will govern the diplomatic representative on all formal occasions. Most foreign courts have an officer in charge of ceremonial matters, and a conference with him is advisable in order to insure conformity with established rules. If there is no such official, the representative confers with the Dean of the Diplomatic Corps. Every country establishes rules as to official calls. American diplomatic representatives must, upon their arrival, inform themselves upon this subject and conform strictly to the rule. In ordinary diplomatic intercourse the first official visit is expected from the foreign minister. It is proper for the minister sent on a foreign mission to make himself known to the government to which he is accredited, and that he should extend his visit to all the chief officers of that government. It is also proper, in case of changes in the members of the administration, that the first visit should be paid by those who may be brought into power. It is the general rule that the secretaries of a government take the rank of foreign ministers. The government of the United States has adopted the European rule, except that heads of the gov-

ernment return the first visit of foreign ministers without regard to grade, and their wives return every visit. In French and English courts the secretaries of governments return the visits of ambassadors only. When heads of states visit the United States, they are usually the official or private guests of the President of the United States.

Social Intercourse.—As economic factors have increased in importance, the social factor of diplomatic intercourse has declined. When the work of the diplomatic service was purely political, its social contact was limited. It comprised usually a social group composed of the society around the court of official persons charged with the function of foreign relations. Such functions were often personal and secret. The social factor, therefore, was an important and in some cases a controlling one. There will always be, however, the fact and need of social intercourse. The instructions of the United States to its diplomatic officers provide that a diplomatic representative shall omit no occasion to maintain the most friendly personal and social relations with the members of the government and of the diplomatic corps at the place of his residence. Ceremonial and social duties weigh heavily on the time and patience of a minister, and no representative who has distinguished himself in a foreign service has neglected their performance. John Quincy Adams was one of our ablest diplomats, and it is scarcely to be denied that much of his success sprang from his popularity in the society of the court to which he was accredited. The rules of social intercourse are fixed for the court or society of the place where the minister resides. His good sense or his taste and sense of propriety will dictate a faithful and meticulous observance of these rules. Notable examples of successful ambassadors accredited to our most important diplomatic post, namely the Court of St. James's, are, within recent years, Walter Hines Page and John W. Davis. These gentlemen, personally affable, having cultivated tastes, possessed of strong intellectual interests, and having a capacity for making contacts, won diplomatic triumphs for their country. Their success is in no small degree attributable to their personality and individual acceptability in government and social circles.

Court Dress.—In 1853 Mr. Marcy, Secretary of State, issued instructions regarding court dress to the diplomatic agents of the United States. He observed that American representatives should conform upon the occasion of their reception, insofar as consistent with American republican notions, to the customs of the country where they were to reside and with the rules prescribed for representatives of their rank. The Department of State encouraged, insofar as it could

do so without impairing his usefulness to his own country, the appearance of the representative at court in the simple dress of an American citizen. Where this could not be done owing to the character of the foreign government, the American representative was advised to make his practice conform as nearly as possible to the American ideal. It was the purpose of the Department, following the precedent of Benjamin Franklin, to remove all obstacles to the return to the simple, unostentatious course observed and approved in the earliest days of our diplomatic relations. All instructions with respect to diplomatic uniform or court dress were withdrawn and each representative was left to regulate the matter according to his own sense of propriety, with a due regard to the views of his own government. By joint resolution of March 22, 1867, Congress forbade persons in the diplomatic service of the United States to wear any uniform or official costume not previously authorized by Congress.

VIII. Department of State

The Department of Foreign Affairs Prior to the Constitution.— The first diplomatic organ of the United States was established by resolution of Congress on November 29, 1775:

> Resolved; that a committee of five be appointed for the sole purpose of corresponding with our friends in Great Britain, Ireland, and other parts of the world, and that they lay their correspondence before Congress when directed.
>
> Resolved; that this Congress will make provision to defray all such expenses as may arise by carrying on such a correspondence, and for the payment of such agents as they may send on this service.

The members of the committee of secret correspondence were: Benjamin Franklin (Chairman), Benjamin Harris, John Dickinson, Thomas Johnson, and John Jay. This resolution is doubly important because it was the first step taken to organize an agency of foreign affairs, and the first even to get in touch with European countries. The committee of foreign affairs was established on April 17, 1777, taking over the work of the committee on secret correspondence. The constant changing of the personnel of the committee and the lack of a permanent executive officer imperiled the work of the committee from the start. The President of the Congress directed the diplomatic correspondence when no committee existed for the purpose. On August 10, 1781, Robert R. Livingston was appointed Secretary of Foreign

Affairs, and there was established a Department of Foreign Affairs. The success which our revolutionary diplomatists achieved must be credited to their own ability rather than to any guidance or aid from Congress. The organization of the Department of Foreign Affairs was anything but satisfactory. In both the determination and administration of foreign policies, experience seemed to be the only teacher.

Organization of the Department of Foreign Affairs.—The first executive department of the government under the Constitution of the United States was established by act of Congress of July 27, 1789. It was styled the Department of Foreign Affairs, and was under the administration of a Secretary for the Department of Foreign Affairs. Owing to the fact that certain functions relating to home or domestic duties were assigned to this department, on September 15, 1789, its name was changed to Department of State, and the title of its head Secretary of State. The expenses of the department for the year 1790 as submitted by Thomas Jefferson, Secretary of State, to the Treasury Department included an expenditure of $8061. The department was made up of the following personnel: one Secretary of State, four clerks, one French interpreter, and two messengers.

Office of the Secretary of State.—The Secretary of State is regarded as the ranking member of the President's cabinet. By act of January 19, 1886, in the case of a vacancy in the office of President and Vice-President, he succeeds to the presidency. In actual importance, his office is next to that of the President. The position has been filled by a long line of distinguished men, and in many cases it has been a stepping stone to the presidency. Often the incumbent of this office has been a man of more personality and individual force than the President himself. Moreover, leading Secretaries of State have their names identified with the more important American foreign policies. This proves that they are leaders in matters of policy as well as in matters of administration. The name of Jefferson is indelibly linked with the policies of non-intervention, of neutrality, and of the *de facto* recognition of states and governments. That of John Quincy Adams is associated with the Monroe Doctrine. Adams probably had more influence in shaping this doctrine than President Monroe himself. Seward worked consistently to prevent the recognition of the belligerency of the Confederate States by the states of Europe, under vexing circumstances, and at times when his position could not be supported by law or precedent. James G. Blaine is regarded as the father of the Pan-American movement. John Hay set forth the principle of the Open Door or of equal commercial opportunity as a rule

for the government of the nations in their relations with China. The name of Elihu Root is identified with our protectorates and with the many constitutional and international situations growing out of the Spanish-American War. William Jennings Bryan was essentially a peace secretary and gave to the United States a series of treaties providing for a waiting period of one year during which the signatory parties would agree not to resort to hostile measures for the settlement of international controversies. Charles Evans Hughes succeeeded to the secretaryship during the difficult days of reconstruction. Our policies as regards Latin America, Europe, the Far East, and World Peace have been re-defined, and such re-definitions are all the more lasting because they have been made during peace-times and with a view to furthering peaceful relations. The international and constitutional situations growing out of the Spanish-American War made possible distinguished contributions to our international and constitutional practice by such men as Elihu Root and William Howard Taft. The service of Secretary Hughes in working out difficult international problems following the bitter period of controversy is no less notable and even more significant in view of its world-wide application. The Secretary of State cannot personally attend to all matters connected with his department. Under the Revised Statutes his duties are thus defined:

> The Secretary of State shall perform such duties as shall from time to time be enjoined on or intrusted to him by the President, relative to correspondence, commissions, or instructions to or with public ministers or consuls from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such matters respecting foreign affairs as the President shall assign to the department, and he shall conduct the business of the department in such manner as the President shall direct.

The Secretary of State should stand in a very close and confidential relation to the President. He is not only the President's foreign agent, but also the eyes through which the President views the foreign affairs of the country. The President is intrusted directly with the foreign relations power, but this work devolves upon the Secretary of State. Official communications with the President must be only through the Secretary of State. This is true not only in regard to foreign correspondence but in regard to correspondence between the executives of the states of the Union and the United States. The Sec-

retary of State has no direct relation with Congress. He may, if invited, appear before committees of Congress to furnish information, to explain treaties, or for any other purpose, but all power exercised by him is purely executive authority. Mr. Bryan, as Secretary of State, appeared at certain hearings conducted by the Senate Committee on Foreign Relations when the ratification of a certain treaty was under consideration. The Senate resented this seeming interference with the legislative function. While Mr. Bryan's presence was probably designed to influence and facilitate ratification, he might easily, if the Foreign Relations Committee had so requested, have discussed and explained the treaty from the executive point of view. There is much to be said in favor of bringing the Secretary of State and the legislative committees charged with foreign relations control closer together. In spite of the constitutional hiatus between the President and his Secretary, and Congress, nevertheless a Secretary who enjoys the confidence of Congress is assured of a large measure of coöperation in the administration of his duties.

An important function of the Secretary of State is that of chief adviser to the President in matters of foreign relations. He keeps his finger on the pulse of foreign situations and reports to the President the facts of the case as they appear to him. He is in a position to appraise fairly and calmly the representations made by American agents abroad whose statements may be more or less colored by the local situation and by reason of their detachment from the affairs of their own country. Not only must the Secretary of State present the facts to the President, but he must also render suitable counsel to the chief executive. The President, with a multiplicity of interests and duties cannot, under the present organization of the government, personally direct each department. He must, therefore, rely upon the Secretary for sound advice. Some presidents, such as Woodrow Wilson and Theodore Roosevelt, insisted upon acting as their own Secretary of State. Colonel House, as disclosed in his *Intimate Papers,* upon being informed of Robert Lansing's appointment, observed that Mr. Wilson would be his own Secretary of State and that Mr. Lansing would be merely his agent in foreign affairs. President Wilson is represented as having viewed Mr. Lansing as a satisfactory clerk but a man without imagination, without leadership, and without the qualities of statesmanship. Later in their official relations, Mr. Wilson peremptorily dismissed Mr. Lansing as Secretary of State because Mr. Lansing's mind did not go along with his own. Mr. Wilson regarded himself as the leader of his party as well as the national

spokesman of the country. Mr. Bryan had been appointed Secretary of State for political reasons, and inevitably these two interesting but different personalities soon clashed. Foreign affairs were conducted from the White House rather than at the Department of State, which became, indeed, practically a relaying station for the President's notes and messages. Mr. Wilson announced American foreign policies to Congress and to the world without direct communication with the Department of State. He carried on a correspondence with American ambassadors abroad without informing the Department of State. Walter Hines Page, having no confidence in the administration of the Department of State under Mr. Bryan, and unsympathetic with Mr. Lansing's legal type of mind, felt obliged to correspond directly with the President. Mr. Wilson received personally official missions from the allied powers without the collaboration of the Department of State. He went abroad to negotiate the treaty of peace as the head of the American peace mission and eclipsed the Secretary of State in the matter of negotiation and in popular favor. Mr. Wilson visited various of the Allied countries and announced boldly the policies of the United States and of the Allied Governments with respect to war and peace aims. In one instance he appealed directly to the Italian people over the heads of the accredited representatives of Italy in support of a certain application of the principle of self-determination which he advanced as one of the principles which should guide the Peace Conference in its solemn deliberations. Secretary Lansing, upon his return to the United States and after his retirement as Secretary of State, wrote a book entitled *The Peace Negotiations.* In it he set forth his grievances against the President, and declared that Mr. Wilson failed to answer his communications and to inform him on matters which were under discussion. He declared that the President, while a crusader and a great political leader, was not a man gifted with the art of negotiation; and also that the President resented the influence of the legal type of mind in international discussions, and that his tendency to ignore his agents charged with the conduct of foreign relations explained in general his failure as a negotiator. Former Secretary of State Foster declared in his book entitled *Diplomatic Practice* that a faithful foreign agent would not rush to print to vindicate his position but would await the flow of time and the official publication of correspondence and records when consistent with the interest of the country. Secretary Lansing did not observe this rule, but saw fit to broadcast to the reading public his position in his relations with Mr. Wilson, and to leave to the judgment of the readers

the facts which appeared in the record. The question is whether the time had then arrived for disclosing the record, and whether Mr. Lansing was the proper medium for that disclosure.

Theodore Roosevelt likewise had a temperamental disregard for the usual channels of diplomacy. In negotiating for a peace between Russia and Japan which terminated in the treaty of Portsmouth, he used the cable freely and took up many phases of the negotiation with certain agents enjoying his special confidence rather than the agents accredited to countries under whose care the negotiations would normally fall. His part in this interesting international episode is vividly portrayed by Tyler Dennett in his interesting book on *Theodore Roosevelt and the Russo-Japanese War*. Mr. Roosevelt in his effort to secure a peace without an indemnity, upon which the Japanese insisted, cabled directly to the Mikado urging the Mikado's support of his position.

Under President Harding the Department of State entered upon a distinct phase in its development. Charles E. Hughes was entrusted with its administration, and was given entire control over the department. He opened and directed the important deliberations of the Washington Conference in 1921, settled the points at issue between the Central American states in 1922, allayed the dissatisfaction between the United States and the nations of the Pacific which seemed at the time to be leading directly to war, re-defined our policies as regards the leading nations of the world, negotiated the peace settlement with Europe, and adjusted our relations with our former Allies, extended the coöperation of the United States in the settlement of the reparation problem, and of other non-political international cooperative undertakings, re-organized the Department of State and the Foreign Service in the direction of increased efficiency, and in general became the directing head of our foreign concerns.

The Re-organized Foreign Service.—On May 24, 1924, the "Rogers Bill" for the reorganization of the foreign service of the United States became a law. Defects of long standing in our foreign service may now be remedied. Until recent years we have stood still in the matter of foreign service reform. The need for improvement was admitted repeatedly, but nothing was done to bring it about. The very force of our foreign rights and interests has made necessary the steps so recently taken. Far from complimenting ourselves, we are merely putting into effect basic alterations which experience and policy dictated long ago. It is perhaps fortunate that the reorganization took place under the administration of Charles E. Hughes, whose understanding and

sympathy were keenly felt by every member of our "first line of defense." Mr. Hughes appreciated the value and wisdom of the change, but he also understood the cause. On May 18, 1922 he declared: "Every American should feel ashamed that any country in the world should have a better diplomatic organization than the United States. It is not a matter simply of national pride; it is a matter of national security." Our prospects for peace abroad are hardly any stronger than the machinery which we have set up for its maintenance. In the past we could assert our idealistic policies without taking the necessary precaution to interpret and apply them, and to organize for extended peaceful negotiation. But that day is gone. We are compelled to maintain as good a diplomatic establishment as any.

The new law, in the first place, seeks to recruit men for the foreign service on the basis of ability alone. To this end a higher salary scale has been adopted, uniform within certain grades and classes, in order that the lack of private means may not deter men of ability. It is believed that the new scale will allow a better standard of living on the part of those who do not have private incomes. The more important consideration is that it opens some of the higher positions to men who could not hitherto aspire to them. The diplomatic and consular services are consolidated, on an interchangeable basis, into the single Foreign Service of the United States. Men of the business branch of our Foreign Service may join the political division, if the Department determines that its interests so require. The fact of amalgamation gives a certain status and dignity to all men in the service, and the work now assumes the character of a profession. The prestige of the consul has been raised, while that of the diplomatic representative has not been lowered. Indeed, both arms of the service have enjoyed a considerable advance. The feature of interchangeability has obvious advantages. Its efficiency will depend upon its administration by the persons in the Department who have charge of the assignment of men to the services and the various posts. The member of the Foreign Service is now called a Foreign Service Officer. There are nine classes of these officers. Class One receives a salary of $9000, while Class Nine receives $3000. The unclassified grades include subordinate officials, such as vice-consuls, consular assistants, interpreters and student interpreters, who receive from $3000 to $1500. The offices are statutory. The old requirements, which could be imposed or withdrawn at the will of the President, have disappeared. Congress has set forth the conditions for admission to the service. Appointment is made initially after examination to the unclassified service, and pro-

motion to the upper branches is only on the basis of merit. Every candidate must be a citizen of the United States. The reclassification of the men of the old services was provided for in the bill, in order that there might be no loss, or at least a minimum loss, to the men during the process of transfer. Representation allowances are made possible, in order that one's private means or income may not be invaded on account of having to meet expenses which are justly a state charge. The important business interests of the United States have preceded governmental activity in this matter. It is one case where government may take a leaf from the book of business. Any Foreign Service Officer may be assigned to service in the Department of State for a period of three years, and, if the public interests demand, for four years. All Foreign Service Officers must now give a bond in a penal sum of not less than their annual salary. Private secretaries of the ambassadors are appointed by the ambassador, and hold office at his pleasure. A retiring system has been put into effect, which safeguards the interests of the men of advanced years. A retired Foreign Service Officer may be recalled to temporary active duty by the President.

A bill has passed the Sixty-ninth Congress which makes provision for homes for our representatives abroad. This step, like that of departmental and service reorganization, is merely one which should have been taken long ago.

These measures will result in an improved service, and in better relations abroad. The important function of our Foreign Service is described by former Secretary of State Hughes:

> In every part of the earth the diplomatic and consular officers of the United States are watching every turn of events in their relation to the general policies of this government. They report every source of international irritation; they note the signals of economic and political unrest, of international rivalries, prejudices, and discriminatory policies. They aid the government not merely in settling disputes, but in removing or limiting the causes of possible controversy.

The Department of State.—Under the Revised Statutes of the United States it is provided "that there shall be at the seat of government, an executive department of the government to be known as the Department of State and a Secretary of State who shall be the head thereof." The Department of State is the legal order of communication between the President and foreign countries. This fact is known by all foreign governments, which transmit their communi-

cations to the Department of State either through their own representatives residing at Washington, or through the American ministers residing at their seats of government. The communications in theory are sent to the President, but they are answered through the Secretary of State. Such mutual correspondence is recorded and preserved in the archives of the Department of State. The relations of the Department of State with Congress are unique. Congress often directs the other heads of departments to submit certain papers for information. Neither directions nor requests are addressed to the Secretary of State. Such requests or directions are sent directly to the President and are qualified by the words, "if in his judgment not incompatible with the public interest." Certain duties distinct from the conduct of foreign affairs devolve upon the Department of State. The Secretary as custodian of the great seal of the United States must see to the countersigning and affixing of the seal to executive proclamations, to commissions, and to warrants for the extradition of fugitives from justice. The Department has custody of the laws of the United States, of treaties made with foreign powers, publication of the laws and resolutions of Congress, amendments to the Constitution, and proclamations declaring that new states are admitted to the Union. The Department also grants and issues passports, as well as issuing exequaturs to foreign consuls. The Department prepares for publication volumes of the *Foreign Relations of the United States.*

The Organization of the Department of State. 1. *Subordinate Secretaries.*—Next in rank to the Secretary of State is the Under-Secretary of State. He acts in the Secretary's absence and often acts for him in matters which are referred directly to his attention. He is a general officer of the Department of State and of the Foreign Service, and is Chairman of the Foreign Service Personnel Board. His functions therefore, are general, and the intention in creating the office was to afford the Secretary an assistant who could at all times aid in the general work of the Department.

There are four Assistant Secretaries of State. One such Assistant Secretary has charge of our foreign commercial policy, commercial treaties, and questions of transportation and communication. In the absence both of the Secretary of State and the Under-Secretary, he becomes acting Secretary of State. Another Assistant Secretary supervises the Division of Passport Control, the Office of Coördination and Review, and the Visa Office. He is the citizenship officer of the Department, and is the adviser with respect to general diplomatic procedure and traditional departmental practice. Still another Assistant

Secretary is chiefly an administrative officer. He is concerned with the administrative affairs of the department, with international conferences and commissions, and with ceremonial affairs. He supervises the office of Chief Clerk, the Division of Publications, and the Bureaus of Accounts, Indexes and Archives. He presents to the President ambassadors and ministers of foreign countries newly accredited to the United States. Finally, an Assistant Secretary is in charge of the consular service and of the various bureaus and divisions of that department. He has supervision over the commercial and economic reports, over correspondence with respect to consular trade assistance and reporting, and distributes the reports of the consular service to other government departments and non-governmental organizations. He is the budget officer of the Department and disburses appropriations from the so-called Emergency Fund.

2. *Offices of the Department. A. Office of the Solicitor.*—The solicitor of the Department of State is the law officer of the Department. He is the adviser of the Secretary on questions of international and municipal law. He is concerned with questions relating to the protection of American interests and citizens abroad, the rights of aliens in the United States, international arbitration, international extradition, and the drafting of treaties. He is the head of the Claims Department and handles claims of American citizens against foreign governments and of nationals of foreign countries against the United States. He is aided by a number of assistant solicitors.

B. Office of the Chief Clerk.—The office of the Chief Clerk supervises the employees of the Department, and controls routine matters. It has charge of supplies and property, office rooms and space, and has general charge of the personnel of the lower grades of employees. It grants leaves of absence and sick-leave, and prepares and preserves the efficiency records of the Department. The Chief Clerk may sign such papers as the Secretary of State directs. He has charge of the applications for appointment to the departmental service, and prepares nominations to the Senate of Foreign Service Officers. He issues exequaturs, warrants of extradition, and commissions. He prepares copy for the department register, the diplomatic and consular list, and the mailing list. He administers oaths of office, keeps the seal of the United States, and is in general the civil service and personnel officer of the Department.

C. The Visa Office.—The Visa office administers the entry of aliens into the United States as regards the granting or the refusal of visas. In general it handles correspondence in regard to visa work and

examines visa applications submitted by the American consuls abroad.

D. Office of the Economic Adviser.—This office advises the Department with respect to economic policy. It establishes contacts with the economic bureaus of other departments and deals with economic cases not committed to other divisions or bureaus. It has charge of correspondence relating to finance, commercial treaties and tariffs, transportation and communication, and foreign commercial policy.

3. *Divisions of the Department of State.*—

A. Divisions Based on Regional Interests

Division of Far-Eastern Affairs.—This division controls American relations with the nations of the Far East embracing Japan, Siam, China, and the leased territories, and to a limited extent the Far-Eastern possessions of European nations, and Siberia.

Division of Latin-American Affairs.—This division supervises the diplomatic and consular relations of the United States with all the states of Latin America except Mexico.

Division of Western European Affairs.—This division directs the economic and political relations of the United States with the states of Western Europe. These states include Austria, Belgium, the British Empire, Czechoslovakia, Denmark, France, Germany, Hungary, Italy, Liberia, the Netherlands, Norway, Portugal, Sweden, Spain, and Switzerland.

Division of Eastern European Affairs.—This division directs our relations with Esthonia, Finland, Latvia, Lithuania, and Poland.

Division of Mexican Affairs.—This division supervises our political and economic relations with the Republic of Mexico. It is the only country which enjoys a separate division. Other divisions have a regional classification whereas this enjoys a national classification. The proximity of Mexico to the United States, and the importance of that country make it stand in a different relation from other American states.

Division of Near Eastern Affairs.—This division supervises our relations with the nations, sovereign and semi-sovereign, of the Near East. It comprehends Abyssinia, Afghanistan, Albania, Armenia, Azerbaijan, Bulgaria, Egypt, Georgia, Greece, Hedjaz, Mesopotamia, Palestine, Persia, Rumania, Kingdom of the Serbs, Croats, and Slovenes, Syria, and Turkey.

B. Divisions based on Function

The Division of Passport Control.—This division examines and decides applications for passports and supervises the passport agencies located in different parts of the United States. It handles correspondence relating to citizenship, passports, registration, and right to protection abroad, and issues letters of introduction.

Division of Publications.—This division supervises the press work of the Department, the session laws and statutes at large of the United States, papers relating to foreign relations of the United States, and other publications. It issues requisitions to the Public Printer, to the Custodian of Indian treaties and historical manuscripts, and the papers relating to constitutional amendments, and of records of boundary and claims commissions. It preserves the original treaties, proclamations, executive orders, and laws.

Division of Political and Economic Information.—As the title designates, this division collects and coördinates such information as is required by the Department. While the information is chiefly political and economic in character, it may pertain to almost any subject. The library of the Department is under its administration.

Division of Current Information.—This is the publicity bureau of the Department and prepares news items for the press. It receives and answers inquiries from newspaper correspondents and distributes to the members of the Department clippings from the daily press. It catalogues information dealing with foreign relations.

Division of Foreign Service Administration.—This division administers generally the foreign service of the United States. It has charge of the diplomatic and consular service abroad and is essentially a field department. It supervises questions of appropriations, rentals, supplies, and expenditures of the diplomatic and consular officers. It designates the commercial, military, and naval attachés of the United States. It arranges for the exchange of publications and is charged generally with the function of foreign service administration.

Bureaus of the Department of State. 1. *Bureau of Indexes and Archives.*—This bureau arranges, records, and indexes the correspondence of the Department, keeps the archives, and has general charge of communications by telegraph, telephone, cable, and through cipher.

2. *Bureau of Accounts.*—This is a technical bureau which keeps a record of the expenditure of appropriations and special funds. It

has charge of correspondence relating to appropriations and examines periodically the accounts of the Department.

Foreign Service Personnel Board.—The only board of the Department of State is that of Foreign Service Personnel. As the Division of Foreign Service Administration has charge of the administrative features of the diplomatic and consular services, so this board has charge of the personnel feature of our foreign service. It prepares the efficiency records of the officers of the service and recommends to the Secretary names for advancement to particular grades in the classified service, and for promotion to the grade of minister. It recommends the position to which an officer shall be sent and his transfer from one branch to another. It recommends dismissals from the service. The executive committee of the Personnel Board receives and files applications for appointment to the foreign service and arranges for examinations for entrance to the service. It distributes blank forms of application for appointment and furnishes information in regard to the foreign service career.

IX. The Consular Service

In General.—The word "consul" is used in a specific sense to denote a particular grade in the consular service, but it is also used in a generic sense to embrace all consular officers. It is difficult to determine just when the consular function was first exercised. Commercial powers early found it necessary to exercise a certain jurisdiction over seamen, vessels, and merchandise. Nations having extended commercial intercourse with neighboring states found it necessary in the national interest to maintain agents in foreign ports. These agents were commercial magistrates discharging functions similar to but less extensive than those discharged today by consuls. During the medieval period consuls became invested with the character of public ministers. They did not have as complete a representative character as the modern minister, but they nevertheless protected the interests of their countrymen, interposed in disputes and helped to decide these, while exercising generally a large commercial and judicial function independent of the local jurisdiction. With the emergence of public ministers the consul lost his position as a political representative and became essentially a commercial representative.

Under the reorganized foreign service of the United States, the consular service is one of the two coördinate branches of a single service. Transfers may be made from one service to the other. The con-

sular service under the reorganized system is a distinct and yet an integral part of the foreign service of the United States.

The Consular Function.—The modern consul is the business representative of his country. He is stationed at the salient ports and trade centers of foreign countries and especially at points where governmental protection is required for American interests.

The office of consul has long existed under international law, and it is also definitely created by the Constitution of the United States. The office itself, therefore, is not created either by act of Congress or by the President. The first law enacted by Congress establishing the powers and duties of consuls provided that the specification of these powers and duties as contained in the act should not be construed to the exclusion of others resulting from the nature of their appointment, or any treaty or convention under which they might act. The creation of a consular office, therefore, like the creation of the diplomatic office, springs first from international law, and second from the Constitution of the United States. The Constitution specifies the term "consul" in addition to "ambassadors and other public ministers." It would seem that the makers of the Constitution kept in mind the distinction between the two offices. A consul is not a public minister and does not have what is called the representative character. While he is under the special protection of international law, he cannot claim the privileges and immunities of diplomatic representatives. Consuls are special foreigners holding a commission from their sovereign and recommended by him to the respect of the government of the foreign country. They are invested with the consular character through the exequatur granted by the receiving government. They are subject to the local laws just as other foreigners are. The Supreme Court exercises original jurisdiction in all cases affecting consuls in the United States. Under the constitutional provisions the Department of State will not appoint to a position in the consular service anyone who holds office under some other government. Consuls-general and consuls are appointed by the President by and with the advice and consent of the Senate. The Congress has vested in the President the power to appoint vice-consuls and consular agents under such regulations as he may prescribe. The appointment of these officers by the Secretary of State has been a practice of long standing. Consular officers are now recommissioned as Foreign Service Officers and not as consuls.

The Exequatur.—The right of a consular officer, whether principal or subordinate, to exercise consular privileges at a particular place

depends upon the scope of his exequatur. This document, issued by the territorial sovereign, formally recognizes the individual as a consul, takes notice of the commission he holds from his own government, and authorizes him to exercise his functions within the district of his appointment. The exequatur is always issued by the receiving government. American exequaturs are signed by the President and the great seal of the United States is affixed. They are issued to foreign consuls holding a commission signed by their chief executive with the state seal affixed. They are not issued to subordinate consular officials. A document issued by the Secretary of State with the seal of the Department of State affixed is issued to those in the lower grades of the service. When a consul-general or consul is appointed by the United States, his commission is retained at the Department of State until he has taken his oath of office and his bond has been signed and approved. The commission is then forwarded to the appropriate diplomatic representative who is instructed to apply for an exequatur. The consul may proceed forthwith to his post and enter upon the discharge of his duties before his exequatur arrives if the local authorities agree. When the exequatur is received, it is transmitted by the representative to the consul together with the commission, either through the consulate general or to the consul himself. The certificates of appointment of all subordinate consular officers of the United States except consular clerks, interpreters, and marshals are transmitted to the diplomatic representative in order to obtain recognition from the government of the country, or permission from the local authorities to act. Where the consul is assigned to a colony or dependency of a country, the principal consular officer must apply to the proper colonial authorities for permission for the newly appointed consular officer to act provisionally, pending the result of a request for an exequatur.

An exequatur may be either refused or revoked. Where a consul is guilty of illegal or improper conduct, he is liable to have his exequatur revoked. If his conduct is criminal, he may be punished according to the laws of the country or sent out of the country at the option of the government. In 1793 President Washington issued an order revoking the exequatur of Mr. Duplaine, French vice-consul at Boston, because he had "with an armed force, opposed the course of the laws of the land . . . and rescued out of the hands of an officer of justice a vessel which he had arrested" by judicial process. Under the Jay Treaty between the United States and Great Britain, each government had the right to dismiss consuls for such reasons as it

should itself think proper. In 1798 President Adams directed the general revocation of the exequaturs of the consul-general and all consuls and vice-consuls of the French Republic throughout the United States.

A government may refuse to grant an exequatur. It is an undoubted right of a government to withhold an exequatur, but this is rarely resorted to. In 1855 Secretary of State Marshall recognized the right of the Nicaraguan government to refuse an exequatur to a Mr. Priest who had been appointed United States consul. The cause assigned for refusal was the publication of a private letter of Mr. Priest which was deemed objectionable. This, Mr. Marshall said, might be regretted as a misfortune, but the Department would not consider it as an injury of which it would be advisable to complain.

Dismissal or Recall.—Not only may a government refuse or revoke a consul's exequatur, but it may revoke commissions of its own consular officers. The participation by an American consul in China in the opium trade, after instructions forbidding such participation, was regarded as ground for his dismissal. A sending government may recall a consul for a variety of reasons, and the receiving government may either request his recall or dismiss him forthwith. The dismissal usually takes the form of the revocation of the exequatur.

Classification and Duties of Consuls. 1. *Consuls-General.*—A consul-general is given supervision over the work of all consular officers within a definite area. This grade may partake of service of three different kinds. One category includes supervision over a definite territory such as the consulates-general at Paris, Berlin, London, and other commercial and political centers. Another category, while charged with the consular functions, performs also a quasi-diplomatic function at the capitals of self-governing dominions where no diplomatic establishment is maintained. A third category holds positions under the jurisdiction of a higher consul-general. For example, the consulate-general at Rome, Italy, is under the control of the consul-general at Genoa.

The duties of the consul-general are too numerous to be set forth here in detail. The work is essentially one of supervision and control. Consuls-general are enforcers and administrators of the consular regulations of the United States, advisers and supervisors of their subordinates, and personnel officers in charge of the efficiency and work of men in the service. They must promote the interest of American citizens, protect them in the enjoyment of their rights under treaty and international law, and promote the trade relations between the United States and the country of their location. The duties extend,

among other things, to the exercise of judicial functions under treaty in certain countries of the East, to the issuing of papers and clearance of American vessels, and to the care of American seamen. They are supposed to take depositions and perform other duties of a notarial character. They grant visas to alien emigrants and enforce the quota requirements of the immigration law. They administer the estates of Americans dying abroad without legal representatives. It is their business to make weekly reports to the Treasury Department on health conditions throughout their districts. They keep a record of American citizens living within their jurisdiction and register the births of children born to American parents. They must coöperate with the Departments of Agriculture, Labor, the Interior, and Commerce, in the preparation of reports regarding conditions of peculiar interest to these departments.

The Consulate-General at London is organized into eight departments. The Commercial Department carries on commercial correspondence and furnishes information with respect to commodities, customs, laws, and other commercial questions. The Shipping Department administers the clearance of vessels, the shipment and distribution of seamen, the execution of quarantine laws, and the checking of alien passports, and conducts correspondence relating to shipping matters. The Citizenship Department has charge of emergency passports, takes application for department passports and consular certificates, registers births, deals with the law of citizenship, with questions of expatriation, and with many legal problems. The Alien Visa Department interviews all aliens bound for the United States and passes upon the eligibility and the suitability of emigrants. The Accounting Department receives all moneys, and especially consular invoices. The Notarial Department takes depositions and performs notarial services of a varied sort. The War Claims Department, which is a product of the war, has recorded claims of a commercial character for seized ships and seized goods. It has collected claims for many American citizens. The Statistical Department records the movement of exports from England to the United States. It also has charge of all out-going correspondence with regard to exports.

2. *Consuls.*—Consuls are next in rank to consuls-general. They may be in independent control of a consulate or they may have the rank of a consul under the head of the consulate. The consul has control of a district within a country and is usually under the direct supervision of the consul-general. The consul performs the duties assigned to the consul-general except that his administration is direct

and that he does not exercise supervisory functions or quasi-diplomatic functions. In the large consulates, where the business requires specialization, different consuls are assigned each to a separate piece of work. The organization and division of work varies as to function and need.

3. *Vice-Consuls.*—There are two classes of vice-consuls: career vice-consuls, and non-career vice-consuls. The career vice-consul is a Foreign Service Officer who has been examined and appointed by the President. He is in line of advancement and has definitely embarked upon the foreign service career. The non-career vice-consuls are clerks who do routine office work. They are sometimes commissioned as vice-consuls in order to permit them to administer oaths and sign official documents of a routine but not of a discretionary character. The vice-consuls take control of the consulate in the absence of the consul. They are under the instructions of their chief and usually conduct the routine work of the office. Much of their work has to do with reporting on trade matters.

4. *Interpreters and Student Interpreters.*—Interpreters are Foreign Service Officers of the consular branch. They have graduated from the position of student interpreters in the Oriental languages. Student interpreters have been appointed to the embassies in Turkey and Japan, and to the legation in China, in order to study the oriental languages. They advance to the grade of interpreters and then to the higher grades of the foreign service. They are unclassified Foreign Service Officers. These officials are consular officers and their linguistic qualifications are merely in addition to the usual consular function.

Consular Privileges and Immunities.—We have seen that consuls are not diplomatic officers and, therefore, cannot lay claim to privileges and immunities peculiar to the latter. They are, however, commissioned by the sending state and recognized by the receiving state. Under international law a consul is entitled to a cordial respect for his person, his consulate, his duties, and his office. He may, when exercising an additional diplomatic function, enjoy a diplomatic character, but this is entirely separate and apart from the performance of his consular duties. Most of the privileges and immunities granted to consuls are provided for by treaty. In the history of the United States there have been only sixteen consular conventions. One hundred and nine other treaties have secured certain immunities for American consuls. Professor Irvin Stewart of the University of Texas has pointed out that the privileges and immunities developed in treaties are of two kinds: those dealing with the consulate, and those

relating to the consul himself. Those dealing with the consulate include the inviolability of the archives of the consular offices, the use of the office as an asylum, and the display of national insignia. Those relating to the consul himself embrace exemptions from military service, public service, taxation, the appearance as a witness in the local courts, immunity from arrest, the privilege of communication with the receiving government, and provisions with respect to the punishment of consuls.

Probably the earliest and most important of the exemptions is that of the inviolability of archives. The relations of the consul to the sending government are confidential, and the records must be at his disposal. In the consular convention with France in 1778 it was stipulated that "the consuls and vice-consuls, and persons attached to their functions; that is to say, their chancellors and secretaries, shall enjoy a full and entire immunity for their chancery and the papers which shall be therein contained." A consul is given the right to display the national coat of arms and to hoist the national flag. The consulate, under the treaty provisions, cannot be used as an asylum. The consular offices and dwellings are, under the terms of some of the treaties, regarded as inviolable. They are not to be invaded under any pretext by the local authorities, and in no case may the local authorities examine or seize the archives and papers deposited in the consulate. Immunity from military billeting and from military service is provided for in the French treaty of 1778, and this provision has been uniformly inserted in subsequent consular conventions. While not necessarily inseparable, the two provisions have usually gone hand in hand. Some of the treaties give exemption from certain kinds of taxation. These exemptions necessarily vary, but a logical order of exemption has been provided for. In five treaties with Mohammedan countries we have agreed to immunity from tariff duties only. Under the French convention of 1778, consuls were exempt from all taxes, duties, impositions, and charges, except such as might be levied on the real or personal estate of the consul. Such property would be subject to taxation as in the case of that of other individuals. Some of the later treaties provide for the immunity of consuls from the jurisdiction of courts. In 1850 a consular convention with Colombia provided that consuls should be summoned in writing when their presence was required in courts of justice. The consular convention with France in 1853 declared that consuls should never be compelled to appear as witnesses before the courts. When any declaration for judicial purposes or deposition should be received from them in the administra-

tion of justice, they should be invited in writing to appear in court, and if they should be unable to appear their testimony should be requested in writing or taken orally at their dwelling. In the next year, M. Dillon, the French consul in San Francisco, was served with a *subpœna duces tecum* in a case where he was desired as witness. An indictment had been filed against Señor Del Valle, Mexican consul at San Francisco, under Section 2 of the neutrality law of 1819. Del Valle was alleged to have enlisted or hired persons to enlist as soldiers in the service of the Republic of Mexico. When the witnesses for the defense were called, M. Dillon was not in court. The subpœna had been returned as "served." The counsel for the defense asked for an attachment against the witness and declared that he was prepared to argue the right of attachment. He was brought into court on the ground that the Sixth Amendment to the Constitution, securing to accused persons the right to have compulsory process for obtaining witnesses in their favor, must override any treaty claim. M. Dillon presented, through his counsel, a protest based upon the foregoing provisions of the French treaty. The French consul was dismissed when the courts concluded that the object of the Sixth Amendment was discharged if the defendant and the government enjoyed equal rights in enforcing the attendance of witnesses. The French Government protested against this treatment of the consul, and the Department of State replied that the Constitution took precedence of the treaty provisions guaranteeing immunity. The French Government protested this decision and the United States Government compromised the matter by saluting a French national ship.

Incidental to the consular office is the right to communicate with the local authority. This is essential to the carrying on of the consul's business. It is not necessary, since he has lost his representative character, that the consul should communicate with the central government of a state. This is allowed in special cases, such as the violation of a treaty provision, the abuse of a fellow-countryman, and in cases of extradition. The consular officers then have the right to complain, for the purpose of protecting the rights of their countrymen, to the authorities of the responsible governments, whether federal or local, judicial or executive, throughout the extent of the consular district, regarding any infraction of the treaties or the Constitution of the United States. Consuls are not, because of their office, exempt from arrest. Certain treaties, however, have provided a limited immunity from arrest in order to expedite the work of the consuls and to maintain freedom of action for them. For example, the treaty with Italy of 1878 pro-

vided that "consular officers, citizens of the state by which they were appointed, shall be exempt from arrest or imprisonment in civil cases, and from preliminary arrest in penal cases except in cases which the local legislation qualifies as crimes and punishes as such." In a few cases it has been provided by treaty that consuls should be punished according to the laws of the sending state when guilty of offenses against such laws, but this provision has not been extensively adopted.

A few treaties have indicated the willingness of the United States to venture into the field of consular immunities. The treaty with Algiers in 1795 provided that the American consul should have every personal security given to him and his household. He was given the liberty of religion in his own house, and was granted the freedom and personal security to travel wherever he pleased within the regency. He could go on board any vessel when he saw fit and could appoint his own dragoman and broker. In the event of war American consuls could embark themselves and their property unmolested on board whatever vessel or vessels they might think proper. The treaty with Muscat in 1833 exempted all property of the consul from seizure, and declared the immunity of the consular household from arrest. The treaty between the United States and China in 1844 gave consuls the right to communicate with the local authorities on terms of equal and reciprocal respect. In case of disrespectful treatment by the local authorities the consul would have the right to represent his case to the superior officers of the Chinese Government, but American consuls were exhorted to avoid all acts of unnecessary offense or collisions with the officers and people of China. Exemptions, because of their special and limited application have not formed precedent for immunities in general.

X. The Treaty-Making Power

Treaties Prior to the Constitution.—Before the adoption of the Articles of Confederation the power to make treaties rested in the Congress. Along with the question of independence, the advisability of entering into treaty relations was seriously considered by the Continental Congress. On June 11, 1776, a committee was appointed to draft three documents: namely, a Declaration of Independence, a form of confederation, and a scheme of treaties with foreign nations. These instruments were tied up respectively with the ideas of independence, union, and treaty-making. The first conventions negotiated and ratified by the Congress were the treaties of alliance and

commerce of 1778 with France. There was at the time no compact or constitution which bound the states or defined the powers of Congress. It, therefore, assumed the treaty-making power. Various commissioners were authorized to negotiate with European states with a view to securing treaties, a recognition of independence, and financial and military aid. The commissioners, with minor exceptions, were fully authorized to confer, treat, agree, and conclude agreements with the powers to which they were sent, and Congress on its part agreed to ratify these agreements.

Under the Articles of Confederation the treaty-making power was expressly vested in the Congress. The states could not, without the consent of the Congress, enter into any conference, agreement, treaty, or alliance with any king, prince, or state. No state could enter into a treaty, confederation, or alliance with another state. In the negotiation of treaties, all instructions, communications, letters of credence and plans of treaties were reduced to writing in the foreign office, resubmitted to the Congress, and then forwarded to the representatives. The Congress, therefore, had absolute control over negotiations. No treaty was valid unless nine states gave their consent. Congress also controlled the process of ratification. It recognized, however, the duty to ratify treaties which it had previously authorized its agents to negotiate. The enforcement of treaties rested generally with the state governments. Under the Articles of Confederation the states retained every right, power, and jurisdiction not expressly delegated to the Congress. Powers so delegated were the right to make war and peace, to communicate with foreign powers, and to enter into treaties. The regulation of commerce with foreign states was not delegated to the Congress. Treaties were entered into with foreign powers embracing such subjects as the descent and tenure of property, the most-favored-nation clause, freedom of worship, residence, trade, and commerce. The principle of reciprocity was applied to these treaties. The states and not the Congress had power to enact laws to put these treaties into effect. Congress, therefore, found itself in the embarrassing position of having the authority to make treaties but without the right to enforce them.

Treaties under the Constitution. 1. *In the Federal Convention.*— The Constitution vested in the President and the Senate the power to make treaties. Alexander Hamilton suggested that the executive, with the advice and approbation of the Senate, should have the power to make treaties. One draft of the Constitution vested this power in the Senate alone. Francis Mercer of Maryland and James Madison ob-

jected that treaty-making was an executive function and that the President should have a share in it. The committee of eleven reported on August 31, 1787, that the President, by and with the consent of the Senate, should have the power to make treaties, but that no treaty should be made without the consent of two-thirds of the members present. This provision was adopted.

The concurrence of two-thirds of the senators present when a treaty is under consideration, is required for its ratification. Several proposals were put before the constitutional convention for its consideration. James Wilson and Rufus King pointed out that a minority might control the will of the majority, and war might be continued against the will of the majority. James Madison suggested that treaties of peace be excepted from the requirement of a two-thirds vote. Gouverneur Morris suggested the concurrence of the President and a majority of the Senate only. Suggestions for ratification by two-thirds of the entire Senate, and by a bare majority were defeated. It was finally agreed that two-thirds of the members present might give their advice and consent to treaties. Gouverneur Morris suggested that no treaty should be binding on the United States which was not ratified by law. James Wilson, declaring that treaties were to be the supreme law of the land, accordingly moved to add to the word "Senate" the clause, "and the House of Representatives." He argued that, since treaties were to have the operation of laws, they ought also to have the sanction of laws. Roger Sherman made the point that secrecy forbade a reference of treaties to the whole legislature. The House of Representatives by design was expressly excluded from a part in treaty-making.

The states are forbidden to enter into treaties. This provision was also included in the Articles of Confederation. Certain of the states had entered into agreements without the consent of Congress. The Committee of Detail reported on August 6, 1787, a clause which forbade the states to enter into compacts with one another or with foreign states without the consent of Congress.

The framers of the Constitution were determined to make treaties a part of the supreme law of the land. Randolph, in indicating the weaknesses of the Articles of Confederation, dwelt especially on the inability of Congress to prevent violations of treaties by the states. Under the Virginia Plan, he would have given to Congress the authority to veto all state laws not in accord with the fundamental instrument. William Paterson suggested that all treaties made and ratified by the United States should be the supreme law of the re-

spective states, and that the judiciaries of the respective states should be bound thereby in their decisions, anything in the respective laws of the United States to the contrary notwithstanding. After some discussion and modification, it was agreed that "this constitution and the laws of the United States which shall be made in the pursuance thereof; and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in each state shall be bound thereby, anything in the constitution or the laws of any state to the contrary notwithstanding." The jurisdiction of the federal courts was extended to treaties. Paterson, in submitting the New Jersey resolutions, urged the establishment of a Federal Judiciary which should have final appellate jurisdiction in all cases in which foreigners were interested in the construction of any treaty or treaties.

Thus the Constitution gave the power of making treaties over to the President with the advice and consent of two-thirds of the senators present; forbade states to enter into treaties, alliances, or confederations, or to enter into any agreement or compact with another state or foreign power without the consent of Congress; decreed treaties to be the supreme law of the land, and binding on the state courts; and extended the jurisdiction of the federal courts to treaties.

2. *Question of Constitutional Limitations.*—A treaty is, together with an act of Congress, the supreme law of the land. They occupy the same position from the standpoint of constitutionality. Wherever an act of Congress would be unconstitutional as invading the reserved rights of the states, a treaty to the same effect would be unconstitutional. In the case of *Geofroy v. Riggs* (133 U. S., 258, 267), it is laid down that:

> The treaty power as expressed in the constitution is in terms unlimited except by those restraints which are found in that instrument against an act of the government or of its departments, and those arising from the nature of the government and that of the states. It would not be contended that it extends so far as to authorize what the constitution forbids or a change in the character of the government, or in that of one of the states, or a cession of any portion of territory of the latter without its consent; but with these exceptions, it is not perceived that there is any limit to which the questions can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.

It is the general opinion of publicists and jurists that a treaty must be made in conformity with the Constitution, and that whenever a

treaty contravenes the principles of the Constitution it must give way to the superior force of the Constitution.

The Constitution confers upon the government of the Union the power to make war and to make treaties. From this flows the right of the government to acquire territory either by conquest or by treaty. The Supreme Court has expressly recognized the right of the government to acquire territory by treaty in time of peace, or as a result of war in carrying out the terms of peace. Treaties of cession or of peace under which territory is acquired have the effect of impressing the inhabitants of the ceded or conquered territory with the nationality of the acquiring state. The allegiance of the former sovereign is dissolved and a new allegiance is acquired. The Constitution provides that Congress may admit new states into the Union, and that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. Congress is also authorized to establish a uniform rule of naturalization. These constitutional provisions empower Congress to deal fully with territories acquired by treaty. The treaties of purchase of 1803, 1819, and 1867, and the treaty of peace of 1848, stipulated that the residents of the acquired territory should be admitted to the enjoyment of the rights of citizens of the United States. Additional legislation is usually required to give legal effect to such provisions.

The question has often been raised as to whether or not the United States may by treaty remove the disabilities of aliens. The Jay Treaty of 1794, between the United States and Great Britain, provided that British subjects who at the time owned lands in the territories of the United States might continue to hold them according to their respective titles. The Supreme Court has held this provision to be a part of the supreme law of the land. The Treaty of Amity and Commerce between the United States and France of 1778 provided that the subjects and inhabitants of the one country should not be reputed aliens in the other, and that they should have the right to dispose of their goods by testament, donation, or otherwise, and that their heirs might succeed *ab intestato* without being obliged to obtain letters of naturalization. Chief Justice Marshall held that this treaty enabled French subjects to hold lands in the United States, and that this treaty, even though made under the Articles of Confederation, had become the supreme law of the land. It is generally conceded to be the right of the President and Senate through treaties to remove alien disabilities. Treaties having this effect take precedence over conflicting

state laws. Certain legislation in some of the western states forbids aliens ineligible to naturalization to own or lease land. This legislation is directed against Chinese and Japanese. While it is admitted that states have the authority so to limit the right to acquire, lease, and dispose of land, it is clear that a treaty between the United States and the governments of the aliens concerned would have the effect of nullifying this legislation.

3. *The Powers of the President in Treaty-Making.*—In the business of negotiating treaties the President is invested with full power. The Constitution states that he shall, with the advice and consent of two-thirds of the senators present, make a treaty. By practice the President's part in treaty-making has come to mean the negotiation and conclusion of a treaty. John Marshall declared that the President was the sole organ of the nation in its external relations and the sole representative with foreign nations, and that he alone had the right to determine all negotiations with other powers. Negotiations are conducted through the Department of State with the authorization of the President. The signing of the treaty and the exchanging of ratifications are by and with his authority. He alone determines if and when treaties shall be negotiated, and the appointment of negotiators rests exclusively with him.

The President performs the final act of ratification. The Senate must give its advice and consent before a treaty is valid, but it is the President who makes the treaty. After the final ratification, and after the exchange of ratifications, the instrument is proclaimed by the President. This public announcement of its terms and of the fact of its ratification can be performed only by the President. The President may negotiate a treaty and yet withhold it from the Senate. There is no requirement that he shall communicate a treaty of his own negotiation to the Senate for formal ratification. The President may submit a treaty to the Senate with recommendations for amendments. Such amendments must, of course, be agreed to by the other signatory powers. The President may refuse to perform the final act of ratification after the Senate has given its approval. The President has on occasion withdrawn treaties from the consideration of the Senate either to close discussion thereon, or to make certain changes by means of further negotiation. All of the formalities of treaty-making, therefore, are vested in the President.

4. *The Advice and Consent of the Senate.*—The first Senate under the Constitution appointed a committee to meet with the President for the discussion of treaties. President Washington met with the com-

mittee and suggested that oral communication would be necessary because of the variety of subjects to be dealt with. Written communications he regarded as tedious and unsatisfactory. The Senate adopted certain rules in regard to its meetings with the President. Washington informed the Senate of his intention to discuss with them a treaty to be negotiated with the Southern Indians. He appeared before the Senate and requested its advice and consent to some of the propositions to be incorporated in the treaty. After explanations by the President and General Knox, the Senate was asked to give its advice and consent by voting on seven specific questions. The Senate asked for time and sought to refer the treaty to a special committee. The questions were postponed and voted on separately. It was the intention of the Senate to establish its right to independent judgment by voting favorably only on a few of the provisions. The President was displeased because of the postponement and he is represented as having left the Senate chamber with a discontented air and a sullen dignity.

Advice is sometimes sought by the President before opening negotiations by message. Often the President, before undertaking to negotiate a treaty, attempts to sound the Senate as to its mind in order that he may be certain of its ratification. The Senate may also advise in the negotiation of treaties by resolution, but such resolutions are only recommendatory and not mandatory. The right of the Senate to adopt them does not flow from its treaty-making powers. They may originate in either house and they may be either joint or concurrent resolutions. They are not binding on the President and cannot deprive him of his constitutional power in treaty-making. The Senate may also render advice through the consultation of individual members. In 1871 Secretary of State Hamilton Fish requested the advice of members of both parties in the Senate with respect to the Johnson-Clarendon convention. Mr. Wilson, after the signing of the Treaty of Versailles, interviewed the Senate Committee on Foreign Relations with a view to explaining the treaty and facilitating its ratification.

On different occasions the Senate has been called upon to confirm the appointment of negotiators. Before the year 1815, the President followed the general policy not only of advising the Senate as to the nature of proposed negotiations, but also of seeking the confirmation of the appointment of negotiators. Since 1815 it has been the usual practice to choose negotiators without confirmation by the Senate. The practice of negotiating treaties by means of special agents has been criticised severely by the Senate, but in spite of the criticism it is regarded as the President's clear right to do so. In 1883 a

resolution was passed ratifying the treaty with Korea. A special envoy had been appointed by the President to negotiate the treaty. The Senate did not admit the right of the President under the Constitution to do this unless invested with such power by the advice and consent of the Senate. The treaty of 1898, between the United States and Spain, was negotiated by five commissioners, three of whom were members of the Foreign Relations Committee of the Senate. No senators were included on the peace commission of 1919 to negotiate the treaty with Germany.

The chief function of the Senate in treaty-making follows negotiation. The first treaty to come before the Senate for ratification was the consular convention of 1788 with France. The Senate had refused to ratify the convention of 1784 because it did not agree with the original plan. However, John Jay urged its ratification in spite of its objectionable features, and the Senate ratified it.

One of the most interesting treaties before the Senate was that negotiated by John Jay in 1794. Washington did not disclose to the Senate the nature of his instructions to Jay, who in negotiating the treaty acted only under the authority of the President. The Senate in dealing with the treaty could either approve or disaprove it. As the treaty was mainly acceptable, but contained certain articles objectionable to the Senate, it was within the power of that body either to refuse its ratification altogether until changes had been made, or to advise ratification subject to such changes. The Senate, therefore, advised and consented to ratification if a part of Article XII, relating to commerce with the British West Indies, should be suspended. The President was instructed to open negotiations on this point. Should the new article as agreed upon be submitted to the Senate? The Secretary of State opposed re-submission. Alexander Hamilton was in favor of it. The article was suspended by agreement with Great Britain and ratifications were exchanged without presenting the treaty again to the Senate.

The Senate, having the power to ratify treaties, clearly has the power to amend them. It is not necessary to re-submit such amendments after the Senate advises ratification subject to them, and after they are assented to by the other party. Treaty amendments are unpopular with the President and Secretary of State, and are often unpopular with the Senate itself. They have a certain mandatory feature which is objectionable, and are proposed by persons who have had no part in the negotiations. They are often refused by the other power and have the effect of defeating the treaty. When the Treaty of Ver-

sailles was under consideration by the Senate of the United States a number of amendments were suggested. These amendments would have required the agreement of most of the states of the world which had been parties on one side or the other in the greatest war of history. In spite of the partisan controversy over the ratification of the treaty, a majority of the senators refused to agree to the amendments.

It is not uncommon for the Senate to prescribe reservations which shall be attached to treaties of general application, in order that the position of the United States may be clearly understood by the contracting parties. Reservations do not have the effect of amendments, but they are more in the sense of statements of the American interpretation of treaty terms. Several reservations were attached to the Treaty of Versailles in the resolution of ratification reported to the Senate by the Committee on Foreign Relations. These reservations in effect provided that the United States should send no troops to foreign parts to carry out the mandates of the League of Nations without the consent of Congress, that the application of the Monroe Doctrine in the New World should not be interfered with by the organization called the League of Nations, and that domestic questions such as immigration could be determined only by the United States. While the resolution of ratification was defeated, it is clear that the treaty could not have been ratified without these reservations. The Four-Power Pact between the United States, England, Japan, and France, signed at Washington in 1922, guarantees to the signatory powers the integrity of their insular possessions located in the Pacific Ocean. This Pact was ratified by the Senate subject to the reservation that its terms should not apply to the archipelago of Japan proper, but only to the Japanese islands of the Pacific which sustained a colonial relation to the main government. Upon the ratification of the protocol of adhesion to the Permanent Court of International Justice, the Senate set forth reservations which defined American policy and which pointed out the course this country might be expected to follow under certain contingencies. One reservation provided that the Congress of the United States should determine the amount it should pay in support of the court. Another provided that there should be no legal or political relation between the United States and the League of Nations. Still another stipulated that advisory opinions should be given in open court and that they should not be rendered in controversies to which the United States was a party without its previous consent. A final reservation provided that the United States should share equally with other nations in selecting judges to the Permanent Court

of International Justice. There can be no question that reservations agreed upon by the Senate must be a rule of conduct for the executive in the enforcement of treaties to which they apply or the Senate will terminate them.

The Senate has a clear right to reject a treaty. This may be done either by a resolution withholding consent, by the failure of a resolution advising ratification, or by inaction. In 1869 the treaty providing for the annexation of the Dominican Republic was definitely rejected. In 1920 the Treaty of Versailles failed to receive the necessary two-thirds vote. The treaties which have been killed by inaction are legion. A motion to advise and consent to the ratification of a treaty or to postpone indefinitely requires a two-thirds vote of the senators present. All other motions in regard to treaties may be decided by a majority. Amendments to treaties may be agreed upon by a majority vote. An adverse vote, in case of a resolution of ratification, does not imply absolute treaty rejection. The treaty may be re-submitted. After acceptance or rejection by the Senate, the President only has the authority to communicate the Senate's action to the other party. Treaties were considered by the Senate in secret session until the end of the first session of the third Congress. In 1800 it was agreed that all treaties should be considered in secret until the injunction to secrecy was removed by resolution.

From the foregoing discussion it appears that the power of the Senate, while seemingly restricted constitutionally only to the matter of advising and consenting to ratification, in actual fact has been much greater. It may, if it is so minded, interfere with instructions, negotiations, and even the application of treaties. The necessity of securing its advice and consent is at times an annoying but nevertheless a wholesome restraint upon a rather sweeping executive power.

5. *Executive Agreements.*—The President has entered into a number of agreements with foreign powers without the advice and consent of the Senate. Several of these agreements have been negotiated by the Executive under his military authority. In addition to general executive power given him by the Constitution, the President is also made Commander-in-Chief of the Army and Navy. A necessary part of this power is the authority to negotiate with foreign governments administrative agreements which cannot, from the nature of the case, be submitted to the Senate. Such agreements take the form of protocols preceding treaties of peace, armistices, and agreements respecting the limitation of armament.

In 1817 Mr. Bagot, British minister to the United States, and Mr.

Rush, Secretary of State, entered into an agreement for the limitation of naval forces by the two governments on the Great Lakes. In 1818 the President, out of abundant caution, submitted the agreement to the Senate for ratification. The measure was ratified in due course. This arrangement has been in effect for more than a century with mutual advantage to both parties. On August 12, 1898, there was signed the protocol of peace between Spain and the United States. This protocol became the basis of the treaty of peace. Under it Spain relinquished sovereignty and title to Cuba and agreed to cede Porto Rico, as well as other Spanish islands in the West Indies, and an island in the Ladrones to be selected by the United States. Hostilities were to be suspended. Cuba and Porto Rico were to be evacuated. The disposition of the Philippines was to be settled by the treaty of peace. With Mexico we have entered into a number of engagements which provide that the troops of both countries may pursue hostile Indian bands into the borders of the other. The United States and Great Britain, by an exchange of notes, agreed in 1859 to the joint military occupation of San Juan Island. This agreement continued in force until the German emperor made his award under the treaty of May 8, 1871. Concerning this agreement Justice Green, of the Supreme Court of the territory of Washington, observed: "The power to make and enforce such a temporary convention respecting its own territory is a necessary incident of every national government, and adheres where the executive power is vested. Such conventions are not treaties within the meaning of the Constitution, and, as treaties, supreme law of the land, conclusive on the courts, but they are national agreements, rendered necessary by national differences involving the faith of the nation and entitled to the respect of the courts." The United States was a party to the armistice of November 11, 1918, which brought to an end the Great War between the Allied and Central Powers.

The President has often entered into agreements which form the basis of future negotiations. These often concern matters of foreign policy. In 1891 a memorandum was signed by Mr. Blaine, as Secretary of State, and Sir Julian Pauncefote, as British ambassador, respecting the articles agreed to in previous correspondence between them to be included in a treaty for the Behring Sea arbitration. In 1899 and 1900 an exchange of notes between the United States, Great Britain, France, Germany, Russia, Italy, and Japan resulted in the adoption of the policy of the Open Door as regards China. Notes having the effect of a declaration of foreign policy with respect to the

Far East were exchanged between Mr. Root and Baron Takihira in 1908, and between Mr. Lansing and Viscount Ishii in 1917. While such agreements cannot bind future administrations, they do have the effect for the time of defining the course of foreign policy.

It is within the power of the President to set in motion the diplomatic machinery for the settlement of claims or injuries of American citizens while resident in foreign countries. Where agreements provide for the adjustment and settlement of claims, and their relinquishment in case of payment, the Senate is not usually consulted as to ratification. Such agreements may be negotiated by the exchange of notes or through a protocol or memorandum. In some cases the adjustment of claims has been accomplished by direct negotiation and settlement. A number of agreements have been entered into for the submission of important claims to arbitration without the advice and consent of the Senate.

A common method of preliminary diplomatic settlement is by means of a *modus vivendi.* This is usually a temporary expedient resorted to by the executive in case of an emergency, pending action by the Senate of the United States. A *modus vivendi,* providing for the protection of fur seals in the Behring Sea within certain areas, was agreed upon between Great Britain and the United States. In 1905 the domestic situation in Santo Domingo was critical. The country was threatened with the intervention of foreign powers due to the failure of the Dominican Government to meet payments on its foreign debt. Certain American claims had remained unsettled for a number of years. President Roosevelt, by means of a *modus vivendi,* agreed with Santo Domingo that the United States should take over the administration of the customs revenues of that country. Receivers were to be appointed by the President and the revenues were to be devoted partly to the running expenses of the Dominican government and partly to discharging the exterior and interior debts of the republic. The *modus vivendi* continued in effect until the treaty was ratified by the Senate in 1907.

The President is sometimes directed by Congress to enter into agreements with other powers. Agreements negotiated by virtue of acts of Congress include such subjects as navigation and commerce, international copyright, trade-marks, and agreements with Indian tribes. A most common form of agreement directed by the legislature is the reciprocity treaty. The President, under several of the tariff laws, has been authorized to enter into agreements admitting to the

United States duty-free certain designated articles which other countries agree to admit within their territorial limits under the same conditions.

6. *The Enforcement of Treaties.*—It is clear that a treaty under the Constitution is completely operative without the support of state legislation. The provision of the Constitution to the effect that treaties shall be the supreme law of the land and that the judges of the state courts shall be bound thereby, anything in the Constitution or law of the states to the contrary notwithstanding, was inserted to give effect to treaties without the embarrassment to the federal government of awaiting the pleasure of state action. A treaty made under the authority of the United States is a part of the law of every state, and its courts must observe and enforce such instruments as they would its own local laws and constitution. In case of any conflict the treaty must prevail.

Treaties enjoy an application without the necessity of supporting congressional legislation. Chief Justice Ellsworth declared in regard to the Jay Treaty in 1796 that, "The instant the President and Senate have made a treaty, the Constitution makes it a law of the land, and, of course, all persons and bodies in whatever states or departments within the jurisdiction of the United States, are bound to conform their questions and proceedings to it. Such a treaty *ipso facto* repeals all existing laws so far as they interfere with it." Chief Justice Marshall declared in 1829, in the case of *Foster v. Nielson:* "Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provision."

An interesting question is the relative constitutional importance of treaties and acts of Congress. Both are by the same provision expressly declared to be the supreme law of the land. Neither may be said to be superior to the other. They are, therefore, on the same constitutional basis and either may have the effect of superseding the other. Justice Field, in the case of *Bartram v. Robertson,* declared, "When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing." The rule of the courts is, therefore, that the instrument, whether law or treaty, which is last in point of time is the one which takes legal effect.

The Constitution declares that all bills for raising revenue shall originate in the House of Representatives. The Senate may propose or concur with amendments. This authority vested in the House of Representatives has sometimes clashed with the treaty-making power. Treaties respecting revenues have sometimes required a modification of the revenue laws. It is logical that treaties entered into on the authority of the President and the Senate respecting revenue matters should have the effect of invalidating inconsistent revenue laws. In spite of this, the House of Representatives has insisted upon legislation by Congress to give effect to such stipulations. The Senate has acquiesced in this demand. Congress, has, therefore, not accepted the view that the President and Senate may, by their exercise of the treaty-making power, invade the constitutional prerogative of the House of Representatives to originate revenue bills. Treaties which have modified revenue bills but which have required legislation to do so are the conventions with Great Britain of 1815 and 1854, and the conventions with France of 1822 and 1831.

Treaties are often entered into which require an appropriation of money. The constitution provides that no money shall be drawn from the treasury but in consequence of appropriations made by law. While a treaty is declared to be the supreme law of the land, it is not regarded as justifying of itself the payment of money out of the treasury. Treaties, therefore, providing for the payment of money, are effective only in case legislation is passed by Congress for this purpose.

The enforcement of treaties is the peculiar function of the courts. They are the supreme law of the land by which judges in state courts are bound. They take precedence over state constitutions and laws. Moreover, the jurisdiction of the federal courts is expressly extended to treaties. The construction of treaties is the province of the judiciary. Treaties are to be regarded, however, in two lights: in the light of politics and in the light of juridical law. The determination of political questions is the function of the political branch of the government. This may be either the executive, the Congress, or both. The supreme court of the United States has uniformly respected the decisions of the political branch in regard to treaty questions which are political in nature.

7. *The Interpretation of Treaties.*—Treaties, according to the Supreme Court, should be interpreted "in a spirit of *uberrima fides*" and in a manner to carry out their manifest purpose. The construction should facilitate their execution as designed by the parties. It is not merely a law but a contract between nations and must be con-

strued so as to give effect to all its provisions. Professor John Bassett Moore has summarized the decisions of the Supreme Court on treaty-making as follows:

> (1) that compacts between governments or nations, like those between individuals, should be interpreted according to the natural, fair, and received acceptation of the terms in which they are expressed; (2) that the obligation of such compacts, unless suspended by some condition or stipulation therein contained, commences with their execution by the authorized agents of the contracting parties, and that their subsequent ratification by the principals themselves has relation to the period of signature; (3) that any act or proceeding, therefore, between the signing and ratification of a treaty, by either of the contracting parties, in contravention of the stipulations of the compact, would be a fraud upon the other party, and could have no validity consistently with a recognition of the compact itself; (4) that a nation which has ceded away her sovereignty and dominion over a territory can, with respect to that territory, rightfully exert no power by which the dominion and sovereignty so ceded would be impaired or diminished.

Certain rules of construction which cover all contractual engagements have been applied to treaties. The minds of the parties must concur on one and the same thing. The construction of treaties is regarded as a matter of law to be regulated by the same rules as prevail in the construction of contracts and statutes. Treaties, like contracts, may be modified and rescinded. Immoral stipulations are void. Where two meanings are admissible, that one is preferred which the party proposing the clause knew at the time to be that which was held by the party accepting it. In case of obscure terms their interpretation is a matter of fact, and extrinsic evidence is admissible to explain the obscurity. The interpretation of a treaty refers to the meaning of particular terms which is explained by local circumstances and by the idioms which the framers of the treaty had in mind, whereas construction relates to the general sense of the treaty and is applied by rules of logic.

The United States has given a special interpretation to the most-favored-nation clause which is incorporated in a number of treaties to which the United States is a party. This celebrated clause means that in matters of navigation and commerce the parties to the treaty shall extend to each other the privileges which are given the most favored nation. The government of the United States has taken the view that reciprocity in matters of navigation and commerce is not a gratuity but can be extended only for a valuable consideration.

Reciprocity agreements, therefore, are regarded as entirely without the application of the most-favored-nation clause. Great Britain has contended that concessions for which a consideration is given may be claimed under the most-favored-nation clause. The design of these clauses as contained in treaties is to establish the principle of equality of treatment. Professor John Bassett Moore has declared: "The test of whether this principle is violated by the concession of advantages to a particular nation is not the form in which such concession is made, but the condition on which it is granted. The question is whether it is given for a price, and whether this price is in the nature of a substantial equivalent and not of a mere evasion." The American interpretation has been sanctioned both by the executive and the judicial departments of the government. In the case of *Bartram v. Robertson* (122 U. S. 116) it was held that the most-favored-nation clause in the Danish treaty of 1858 does not oblige the United States to extend to Denmark without consideration privileges which have been conceded to the Hawaiian Islands by the treaty of 1875 in return for valuable concessions.

Since the Great War, the United States has modified substantially its interpretation of the most-favored-nation clause. The government seems to have substituted the continental doctrine for its own. For example, under Article VII of the recent commercial treaty with Germany (1923–1926), the contracting parties agree to extend to each other unconditional most-favored-nation treatment, including gratuitous concessions, and treatment based on reciprocity agreements. These arrangements will doubtless influence our future commercial treaties.

8. *The Termination of Treaties.*—Professor Wharton has pointed out in his *International Law Digest* that treaties may be modified or abrogated when the parties mutually consent; when continuance is conditioned on terms which no longer exist; when either party refuses to perform a material stipulation; when all the material stipulations have been performed; when a party having the option elects to withdraw; when performance becomes physically or morally impossible; and when a state of things which was the basis of the treaty, and one of its tacit conditions, no longer exists. Under the doctrine *rebus sic stantibus,* a treaty may be regarded as abrogated when the material circumstances upon which it rests change. In case of violation of a treaty by one of the contracting parties, the injured party is privileged to declare it broken. The treaty is not void but is voidable at the election of the injured party.

Treaties are often terminated by notice. Such provisions are commonly inserted in a treaty which stipulate that it may be terminated by notice of a certain time given by one of the contracting parties to the other. Such notice in the United States must be given by the President and is generally authorized by the Congress in the form of a joint resolution. Treaties are sometimes abrogated by reason of a change in conditions. In 1793 President Washington submitted certain questions to his cabinet respecting the treaties of 1778 with France. One question was whether or not the United States should consider the treaties previously made with France as still in force. Thomas Jefferson as Secretary of State maintained that the treaties referred to were not between the United States and Louis Capet, but between the two nations of America and France. Both nations, he observed, had since changed their forms of government. The United States had changed from a confederation to a federal union under the Constitution of 1789. France had changed from a monarchy to a republic. The mere fact of changing their forms of government did not have the effect, he argued, of annulling the treaties. The treaties were continued in effect until 1798, when they were abrogated by Congress for reasons other than constitutional changes. A change in the form of government, therefore, does not under international law annul previously existing treaties. Sometimes the existence of a state is terminated through its incorporation into another state. The act of political incorporation has the effect of terminating automatically the engagements of the former state. The annexing state may, in its discretion, continue in effect the treaties of the incorporated state. Where a state loses partial but not complete identity, treaties are regarded as continuing in effect if it has power over the subject matter of the treaty. A treaty may be expressly abrogated by act of Congress. Thus the treaty-terminating power may be to some extent different from the treaty-making power. A treaty may be terminated by a later treaty either because of the inconsistent provisions of the former or because of the express stipulations of the latter. Moreover, a treaty may be terminated by an act of Congress which is later in point of time than the treaty. It should be remembered in the process of treaty-termination that a treaty, while a law of the land, is also an international contract binding upon two or more countries. Abrogations, denunciations, and terminations, therefore, under our Constitution and laws are complicated by the fact that there are two parties to the instruments.

XI. The Recognition Power

One of the leading foreign policies of the United States is that of the *de facto* recognition of states and governments. This policy has become a classic one, and together with the principle of non-intervention it forms one of the distinguished contributions of the United States to international practice. Fully as interesting is the recognition power in the United States. Who has the power to recognize a new state? By whom is recognition determined? The Constitution does not refer to this subject. The modes of recognition seem to be clearly in the hands of the executive. One evidence of recognition is that of entering into treaty relations with another state. We have seen that only the President can begin treaty negotiations and that he alone can exchange ratifications. Moreover, the maintenance of diplomatic intercourse with a foreign country is evidential of recognition. Under the Constitution the President, with the advice and consent of the Senate, accredits ambassadors and other public ministers to neighboring states. While confirmation of the appointment is necessary, the existence of the state as a member of the family of nations justifying the accrediting of a diplomatic representative is first noticed by the executive. The Constitution also gives to the President the power to receive ambassadors and other public ministers from neighboring states. This is an evidence of the power to recognize. Congress only can declare war, but the President must, under the Constitution, carry it on. A declaration of war against an independent state is clearly a recognition of its independent status.

The Congress of the United States has on a few occasions attempted to determine or influence the recognition of foreign governments. The colonies of Spain in Central and South America sought recognition by the American Government. The President of the United States was careful to observe our neutral position in the conflict between Spain and the colonies and to let the matter of recognition rest upon the question of fact alone. Certain members of Congress were enthusiastic about recognition and sought for Congressional action to hasten this. The leader of the movement was Henry Clay, who introduced measures in Congress providing for a minister to the South-American countries. Clay was of the opinion that the power to recognize resided in Congress. The President sought the coöperation of the Congress in the matter of recognition, but he held to the view that the discretion as to their recognition rested with him. Recognition was finally given by sending and receiving diplomatic representatives. In 1836 the Sen-

ate and House of Representatives passed resolutions declaring that Texas ought to be acknowledged as an independent state by this government whenever there was satisfactory information that it had a government capable of performing the duties and fulfilling the obligations of an independent power. Andrew Jackson, usually firm and determined in domestic affairs, took a very guarded position in this problem of foreign relations. In a message to Congress on the question of the recognition of Texas, he declared that the power to recognize was nowhere expressly delegated and that the expediency of recognizing the independence of Texas should be left to the decision of Congress. Money was appropriated for a diplomatic establishment when the President received evidence of Texas' independent condition. A report by Henry Clay from the Committee on Foreign Relations of the Senate set forth the various ways in which Texas could be recognized as an independent power. These were: first, by treaty; second, by the passage of a law regulating commercial intercourse between the two powers; third, by sending a diplomatic agent to Texas with the usual credentials; and, finally, by the executive's receiving and accrediting a diplomatic representative from Texas which would be a recognition as far as the executive only was competent to make it. In the first and third modes, the concurrence of the Senate in its executive character would be necessary; and in the second, in its legislative character. Mr. Clay pointed out that the Senate alone without the coöperation of some other branch of the government was not competent to recognize a foreign government.

Under the Constitution the President has charge of foreign intercourse and he ought to take the initiative in the recognition of the independence of new states. The President, if tardy in the matter of recognition, may be quickened by congressional statute or resolution. The resolution of intervention passed by Congress in 1898 declared that "the independence of the republic of Cuba be, and the same is hereby, acknowledged by the United States of America." This was in effect the recognition of Cuban independence by a resolution of Congress, which had the effect of a declaration of war against Spain. Within recent years the view has been taken that recognition of new states and governments pertains to the executive alone. President Roosevelt took the initiative in recognizing the new Republic of Panama in 1903. Woodrow Wilson issued a statement of policy in regard to the Latin-American governments soon after his assumption of the presidency in 1913. He expressed the view that thenceforth only such governments as were orderly or constitutional would receive the

recognition and support of the United States. Acting alone, and without the advice and consent of Congress, he carried his new recognition doctrine into effect. In accepting the Democratic nomination for the presidency on September 2, 1916, he declared that so long as the power of recognition rested with him, the government of the United States would refuse to extend the hand of welcome to anyone who attained power in a sister republic by treachery and violence. Often the courts must take judicial notice of the question of recognition. The attitude of the courts toward a *de facto* and *de jure* government must be defined. Moreover, the acts of a non-recognized government must sometimes be passed upon. The judicial tribunals have uniformly respected the right of the political departments of the government to determine the question of recognition. Chief Justice Taney declared in 1852 that the question of the independence of Texas should be considered by that department of the government charged with foreign relations. In the case of *Oetjen v. the Central Leather Company* (246 U. S. 297) the Supreme Court declared that "this court will take judicial notice of the fact that . . . the government of the United States recognized the government of Carranza as a *de facto* government of Mexico on October 19, 1915, and as the *de jure* government on August 31, 1917." The same decision set forth that the conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative, that is to say, to the political departments of the government, and that the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.

XII. Extradition

Extradition, according to the Supreme Court of the United States, is the "surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands surrender." In some of the continental states, such as Italy, crime is regarded as a national act and is punishable by the laws of the state of the accused. In England and in the United States crime is regarded as a territorial act. In the absence of a system of laws to cover such cases, it is regarded as a better practice to return the accused to the country where the crime was committed for trial.

Under American law, extradition is a national and not a state act. At one time the states were regarded by some authorities as having the power to surrender fugitive criminals to foreign governments.

While the question has not been free from doubt, the best opinion is strongly in favor of surrender in such cases by the federal government alone. The opinion of the Supreme Court has been expressed by Justice Miller as follows: "There can be little doubt of the soundness of the opinion of Chief Justice Taney (in *Holmes v. Jennison*) . . . it can hardly be admitted that even in the absence of treaties or acts of Congress on the subject, the extradition of fugitives from justice can become the subject of negotiation between a state of this union and a foreign government."

The extradition of criminals is not, under modern practice, a matter of international obligation. It may be requested as a matter of courtesy, but it is at best only an imperfect right, resting on the good will and convenience of the state to which the request is addressed. International law does not, therefore, embrace the right of a nation to demand extradition. There is some question as to whether a state has the right to deliver up a criminal in the absence of a treaty. Mr. Jefferson, as Secretary of State, declared that the laws of the United States, like those of England, gave refuge to every fugitive, and that no authority except the executive could deliver him up. Secretaries of State and Attorneys-General have uniformly held that the President can make no delivery unless under treaty or by act of Congress. Moreover, the duty of extradition cannot be inferred from the most-favored-nation clause in treaties of commerce and navigation. The United States has therefore declined to surrender fugitive criminals except under treaty arrangement. We have sometimes requested the delivery of criminals from states with whom we have had no treaty relations on the subject. We have explained our inability to reciprocate in the act of surrender. Several Secretaries of States have held to the view that we should not ask for extradition where we cannot reciprocate. Immigration acts which authorize the return of alien convicts to their own country do not have the effect of an extradition treaty and do not give the President the right to deliver up fugitive criminals on demand from foreign governments. The United States has taken the position that its ministers and consuls invested by treaty and statute with judicial powers do not have the right under these arrangements to deliver up criminals. We have accordingly entered into extradition treaties with countries where we are entitled to extra-territoriality.

Treaties which provide for the extradition of fugitive criminals do not confer an absolute right of demand and surrender. Detailed provisions are made as regards evidence, the nature and kinds of extradi-

table offenses, and the procedure of surrender. The treaties of the United States require the producing of such evidence as would justify the arrest and trial of the accused in the place or country of asylum. This implies that the accused must have violated the laws of the surrendering and the demanding countries. Moreover, this evidence must be passed upon by a court of law because such an act is a judicial function. Extradition treaties of the United States, while in some cases requiring supplementary legislation for their complete execution, are nevertheless supreme laws and binding on the courts as well as the executive. Legislation is, therefore, not necessary to give them legal effect. Treaties set forth the usual extraditable offenses and, of course, vary according to the needs of the times. A person can be extradited only for a treaty offense, that is, for an offense named in the treaty of extradition. The usual practice has been to except political offenses from the list of acts for which delivery may be made under such a treaty, and in most of our treaties of extradition provisions have been inserted excepting persons guilty of political offenses. In determining what constitutes a political offense, and therefore not an extraditable one, the courts have applied a few elemental tests. There must have been a revolutionary uprising against the demanding government, participated in by the accused, whose acts were only incidental to the movement. The evidence may fail to show that the acts were committed by the accused. If the political character of the crime is established, the question of intent or malice is immaterial. We have agreed to treaties which have declared that the assassination of the head or the sovereign of a state shall not be regarded as a political offense. A usual provision in extradition treaties is to the effect that contracting parties need not deliver up their own nationals. Where this is the case, no demand is made for the surrender of nationals of another state. Some treaties of the United States do not include this provision. Despite the fact that our treaty with Italy makes no such statement, the Italian Government has refused to deliver up her own nationals who have committed crimes in the United States. It is contended by Italy that her citizens cannot be extradited under her penal laws, and that they will be fully and adequately punished under Italian law. The government of the United States has continued, in spite of the Italian position, to surrender American citizens on demand to Italy, on the ground that reciprocity in the surrender of citizens is not essential to the validity of the treaty from the American standpoint. In the case of *Charlton v. Kelly,* the Supreme Court held that the accused must be surrendered under the

treaty provision as the supreme law of the land, which afforded ample authority for the warrant of extradition.

It is an elemental principle that a person may be surrendered only for a treaty offense and only for the one for which he was extradited. In 1884 one Rauscher was indicted in the Federal Circuit Court of New York for cruel and unusual punishment of a member of a crew on the high seas. It was shown at the trial that he had been extradited from England on a charge of murdering the seaman. The two offenses were based upon the same facts. The case was certified to the Supreme Court as to whether the prisoner, after extradition under the treaty of 1842 on a charge of murder under one section, could be held and tried for the cruel and unusual punishment of a seaman under the other section. Justice Miller held that the treaty of 1842 was the supreme law of the land and was binding upon the courts, which were bound to take judicial notice of it. He observed that the treaty contained no prohibition of the trial of a person for an offense other than the one for which he was surrendered. Principle and authority, however, supported the proposition that a person brought within the jurisdiction of a country under a treaty of extradition could be tried only for an offense described in the treaty, and for the offense charged against him in the proceedings of extradition. A reasonable time must be given such a person, after his release or trial on such a charge, to return to the surrendering country.

It sometimes happens that a fugitive is recovered by a demanding government in an irregular manner. In 1863 Secretary of State Seward complained to Lord Lyons, British minister to the United States, that the Canadian constables had abducted two persons from Port Huron, Michigan. The Governor-General of Canada, Earl Monck, disavowed the act, rebuked the arresting officers, and offered to release or return the abducted persons if the United States should require it. The explanations of Lord Monck were accepted and, in view of the fact that the papers disclosed the abducted persons to be felons who had violated the laws of Canada and sought refuge in Michigan, Mr. Seward declared that the United States would not insist upon their liberation or restoration. If a fugitive is wrongfully taken from the jurisdiction of another state, only the government of such country can complain of the violation of its territory. The fugitive cannot set up that he was not extradited under a treaty where such treaty relations exist. Fugitives from justice, therefore, cannot seek to defeat justice by taking advantage of irregularities in the matter of recovery. This right of complaint inheres only in the state whose rights have been invaded.

All demands for extradition must come from the executive authority of the demanding state. Early in our extradition procedure the practice developed in the Department of State of issuing "mandates" or "warrants" certifying that requisitions had been received. They were issued only when called for, and very infrequently, as the application for arrest was made directly to the commissioner or judge. By the Revised Statutes the certificate of extradition must show upon its face that the officer who made it is the principal diplomatic or consular officer of the United States resident in the country making the demand of extradition, and must declare that the documents to which it is attached are legally authenticated according to the laws of the country from which the fugitive escaped. The surrender of fugitives from justice is a governmental act performed by the executive. In this country the warrant of surrender is issued by the Secretary of State, who represents the President in foreign affairs, and the act of the Secretary of State is regarded as the act of the President. The executive may use his discretion as to whether or not international law, treaty arrangements, and the laws of the United States are observed in the application of extradition. Certain obstacles to surrender may arise. For example, the courts of the United States may hold a fugitive for trial on any charge which may be pending against him before he may be surrendered. The expenses of extradition, including fees of counsel if any, are paid by the demanding government.

XIII. Aliens

The United States Government has jurisdiction over aliens within its borders. They are entitled to the same protection in their personal rights as our citizens. By treaty arrangement we have agreed that aliens may resort to this country and transact business and commercial affairs here without molestation or disfavor. This is a rule of general application which is essential to commercial intercourse. Any alien lawfully admitted to the United States is entitled to the same degree of police protection and the same degree of safety as an American citizen. The United States, with very few exceptions, makes no distinction between the exercise of civil rights by American citizens and by aliens. An alien resident in the United States is entitled to the protection of his property by the government. The same judicial remedies are open to foreigners that are open to citizens of

the United States, except in time of war when, under the universally accepted rule of nations, enemy aliens, except those under license from the government, have no status before the courts of the United States. While entitled to the judicial remedies of the United States, aliens domiciled here owe the government a local and temporary allegiance, which continues during the period of their residence. They may be tried for offenses just as citizens are tried. In fact, aliens resident in this country owe to it a temporary political allegiance, and may be punished for offenses committed against its sovereignty. The power to tax aliens resides in the government of their residence and is not subject to exception unless by express agreement.

Alienage may operate to exclude a foreigner from certain privileges. It generally operates as a disqualification for public office. It also disqualifies generally for service on jury. Under the patent laws of the United States the right to take out patents is confined to American citizens. Aliens may be required to register in the country where they happen to reside. An alien must, in case he seeks to communicate with the President, address the executive through the minister of the nation of which he is a subject or citizen.

The statutes and judicial decisions of the various states set forth the law which regulates the acquisition, inheritance, and holding of lands by aliens in the various states of the Union. An alien may, by common law, take lands by purchase, though he cannot dispose of them by descent. The government has the authority to determine the rights of aliens with respect to real property. In some of the states the statutes confirm the common law, while in others substantial modifications have been made. The government of the United States is not competent to interfere with the legislation of the states with respect to the property of foreigners, unless a treaty provision authorizes such interference. A number of treaties between the United States and foreign countries have had the effect of removing the disabilities of aliens as regards the acquisition, disposal, and inheritance of real property. Under the treaty of 1778 with France, French subjects were entitled to purchase and hold lands in the United States. By Article VII of the treaty between the United States and the Hanseatic representatives, citizens of Bremen were given three years within which to dispose of an inherited interest in lands in Illinois, in spite of an act of 1887 which disabled non-resident aliens from taking or holding lands in that state. By Article IX of the Jay Treaty, British subjects holding lands in the United States and their heirs, so far as respects those lands and the remedies incident thereto, could not be consid-

ered as aliens. There is no doubt as to the power of an American state to exclude aliens from the right to purchase, inherit, or dispose of real property. On the other hand, there is no doubt that these restrictions may be automatically removed by a treaty between the United States and a foreign government admitting the aliens of that government to the privileges of land ownership in the United States. Aliens have often voluntarily enlisted in the military service of the United States. This presents an international question. The usual practice of excluding aliens from military service has simplified it. A foreign-born person is not liable to render military service unless by some act he has been admitted to American citizenship, claimed the privileges of an American citizen, or signified his intention to become a citizen. During the Civil War all persons who had voted as state citizens were claimed by the American Government as liable to the conscription act. Moreover, the act of March 3, 1863, declared that the levy should include all persons of foreign birth who should have declared on oath their intention to become citizens.

It is also recognized that a state may, in case of extreme necessity, enroll in the military forces all persons within its territories, whether citizens or domiciled foreigners. By act of Congress of April 22, 1898, all able-bodied men of foreign birth between the ages of eighteen and forty-five who had declared their intention to become American citizens were constituted a part of the national forces. In 1917 Mr. Lansing, as Secretary of State, declared that the United States had generally followed the practice of exempting neutrals from military service. When the United States entered the war in 1917, there were many able-bodied male citizens, neutral and enemy, who were physically eligible for service. Many of these aliens were subjects of the allied governments. The selective draft law of May 18, 1917, applied to male persons, not alien enemies, who had declared their intention to become citizens. A number of neutral countries sought the discharge of their subjects under this law, alleging a violation of treaty or of international practice. The United States Government agreed to the release of such conscripted neutral aliens. Congress, however, provided that such release of neutral aliens who had applied for admission to citizenship, should be conditioned upon the automatic cancellation of their declaration of intention, and that they should forever be debarred from becoming American citizens. Citizens of one country residing in the other, may be free from military service, but such aliens must pay the military taxes which are demanded of the exempted classes. Alienage is no bar, therefore, to taxes levied for

military purposes. The United States has the power to exclude foreigners from the country when, in its judgment, the public interest requires it. This right has been asserted repeatedly and cannot be surrendered or restrained by a treaty. This is a maxim of international law inherent in the sovereignty of every state and essential to its self-preservation. In the United States this power is vested in the national government, which controls international relations in peace and in war. The political departments of the goverment exercise the authority either through treaties made by the President and the Senate, or through statutes enacted by the Congress. Arbitrary action either as to the selection of the person expelled or as to the method of expulsion is not sound international practice. The reasons for expulsion are usually communicated to the state of the expelled person. Unusually harsh methods of expulsion are sometimes used, leading to international friction. Causes of expulsion differ in the various states. The test is generally left to the determination of each state. The deportation of aliens guilty of the violation of the laws of a state is a regular procedure. The existence of war may have the effect of requiring the general expulsion of aliens. During the World War the United States did not expel alien enemies in a wholesale manner. After the armistice of November 11, 1918, a number of alien enemies who had not been interned during the War were deported, together with a number of people who had not complied with the immigration regulations. The United States has freely exercised the right to expel aliens, but has not extended the right to include discriminations on grounds of race, profession, creed, or faith.

Immigration or the Admission of Aliens.—Professor John Bassett Moore has declared that the power to regulate immigration is an incident of the sovereign right to expel or exclude objectionable aliens. The exercise of the power in a particular country is governed by the Constitution and laws of the country. In the United States, in particular, it belongs to the national government as a part of its power to regulate commerce. Mr. Justice Gray declared, in the case of *Nishimura Eki v. the United States,* that "it is an accepted maxim of international law that every sovereign nation has the power as inherent in sovereignty and essential to self-preservation, to admit the entrance of foreigners within its dominions or to admit them only in such cases or upon such conditions as it may see fit to prescribe." The United States alone determines what classes of aliens are dangerous or undesirable. Its laws exclude many classes, such as imbeciles, feeble-minded persons, idiots, insane persons, epi-

leptics; persons affected with chronic alcoholism, paupers, vagrants, personal beggars; persons afflicted with tuberculosis or with loathsome or dangerous contagious diseases, persons found afflicted with such physical defects as will reduce their ability to earn a living; persons guilty of a felony or other crime or misdemeanor involving moral turpitude; polygamists or persons who practice in or believe or advocate the practice of polygamy; prostitutes or persons encouraging prostitution; contract laborers, laborers induced by advertisements in a foreign country to come to the United States; persons likely to become a public charge; persons previously deported under the immigration laws, anarchists, persons who advise, advocate, or teach, or are members of organizations which advertise, advocate, or teach, opposition to organized government; aliens who champion or belong to an organization which champions the overthrow of the government of the United States or forms of law by violence, or teach the duty, necessity, or propriety of killing or assaulting officials of the American government or of other organized governments because of their official character, or the unlawful danger, injury, or destruction of property, or sabotage; aliens who write, publish, circulate, or distribute material advocating or teaching the foregoing doctrines, or aliens who are members of or affiliated with organizations who do or encourage the same.

For more than a century the United States followed the liberal policy of free and unrestricted immigration. We occupied a new region of the world and the coming of new peoples to our shores was heartily encouraged. In the last quarter of the nineteenth century an agitation for the restriction of immigration was definitely under way. The dissatisfaction was chiefly on the Pacific Coast where the large immigration of Chinese coolies into the United States seriously interfered with the wages and working conditions of American workmen. In 1882, therefore, Congress passed a law forbidding the immigration of Chinese coolies, and idiots, paupers, and lunatics of whatever nationality. This was the beginning of a progressive series of limitations upon the admission of aliens. Certain preferred classes of Chinese citizens were admitted and the provisions of the law were later incorporated into treaties with China. These treaties had the effect not only of excluding Chinese laborers but also of securing the agreement of China to the restrictions. The law of 1917 excluded natives of islands not possessed by the United States adjacent to the continent of Asia, or the natives of any country, province, or dependency situated on the continent of Asia within certain prescribed limits. The

same statute contained a literacy test. With certain exceptions, it excluded all aliens over sixteen years of age physically capable of reading who could not read the English language or some other language or dialect, including Hebrew or Yiddish.

By the law of 1921 it was provided that the number of aliens admitted in any particular year should not exceed three per cent of the number of each nationality as disclosed by the census to be resident in the United States in 1910. Immediately our immigration crop was reduced from one million to about 350,000 people a year. The most serious restriction was the law of 1924. By this law the census of 1890 is taken as a basis and the number of aliens admitted each year was reduced to two per cent of the number of nationals of a particular state resident here in 1890. The law will have the effect of cutting down the annual immigration to a figure less than half of that corresponding to the number admitted under the law of 1921. It is designed to increase the immigration of persons from the countries of northern Europe and to decrease the number of immigrants from the nations of southern and eastern Europe.

Special provisions in regard to the Japanese have been described in a preceding chapter. The Japanese government, while admitting the right of the United States to determine for itself what persons shall be admitted to its shores, has vigorously protested the application of the principle of exclusion to them as a want of respect to a great power and friendly nation. A small but active group in the United States is agitating an amendment of the law, and pointing out that the difference in the number of Japanese admitted under the quota principle and under the exclusion principle is negligible, and that the questionable advantages under the exclusion principle are more than offset by the manifold disadvantages which have followed it.

XIV. Claims for Diplomatic Protection

When a citizen of one nation is wronged by the conduct of another nation, he must seek redress through his own government. The responsibility of pressing his claim is assumed by his government. When the claim is against the United States it must be presented to the Department of State through the diplomatic representative of the country to which the alien belongs. It must, therefore, go through the usual diplomatic channels. Again, presentation of claims against a foreign state on behalf of an American citizen must be made through the Department of State. Claims against foreign governments not founded

on contract, where the assistance of the Department of State is desired, must be accompanied by proper proof. A circular is issued to the claimant in which he must set forth the amount of the claim, the time and place of its origin, the kind of property injured, the facts and circumstances attending the loss or injury out of which the claim arose, and the principles and causes lying at the foundation of the claim. Other information is required. It is within the discretion of the Department of State to refuse or to delay presentation. This is expressly the case when in its opinion the claim is speculative or exorbitant in amount. Certain obstacles to presentation often arise. If a claim is based on an act against public policy, the United States will not lend its diplomatic aid in presenting it. Where a person has, even without forfeiting his citizenship, so conducted himself as to lose his right to national protection, the government will refuse to press his claim. A party whose own malicious wrong or negligence has resulted in injury to himself cannot recover damages for such injury. The United States will not press claims which have grown out of unneutral transactions. The government, in pressing a claim against a foreign government for its citizen, decides for itself as to the time, manner, and extent of its pressure of the claim.

The United States will generally intervene in the pressure of claims only in behalf of its citizens. While a declaration of intention requires a limited allegiance of such persons, it does not extend to them the diplomatic protection of the United States to the extent of pressing their claims against a foreign government. A person who has been naturalized cannot claim the advantages of the pressure of an international claim which arose prior to the act of naturalization. A claim may be assigned by a citizen of one country to a citizen of another, but the right of intervention in behalf of a claim is independent of any transaction of assignment and cannot itself be transferred. The government may, at its pleasure, intervene in behalf of companies incorporated under its laws or under the laws of constituent parts of the union. The act of incorporation is regarded as covering the artificial person with the nationality of its creator, without regard to the citizenship of the individuals owning the securities of the company.

Certain settled principles determine the ground of diplomatic intervention. One such ground is a denial of justice to individuals on account of injuries in person or in property. The act may be committed by the government itself or by one of its agencies. If an American citizen is convicted and punished in a foreign country, in a trial conducted with injustice and in violation of settled principles of law,

claim for redress will be made by the United States. Before taking up the claim against a foreign government the local remedies of the state concerned must as a rule be exhausted. Where ample means of redress are offered without the intervention of the government the United States will not intervene. Local remedies need not be exhausted, however, under certain conditions. If justice is wanting, the United States will intervene. Certainly no claimant can exhaust local remedies in a state where there is no justice to exhaust. Moreover, where local remedies have been superseded, and the claimant has no access to means of redress, the United States will intervene. If local remedies exist but in the judgment of the United States are insufficient, this government will also interpose. An unjust judgment by a foreign court is not a bar to diplomatic proceedings against the sovereign of the court rendering the judgment, and is not internationally binding. Unfair discriminations against American citizens, such as subjecting them to harsh imprisonment or other injustice, may be made the basis of a claim for damages. Claims to land may be made in case there is a denial of justice. Title to land is determined by the law of the country wherein the real estate is situated, and, in general, all remedies for injustice in respect to the land must be followed by the aggrieved party before the tribunals of such country. The government of the United States does not, except, by its good offices, prosecute claims founded on contracts with foreign governments. The only exception to this rule is where diplomacy is the sole method of redress. Claims growing out of the acts of governments, governmental authorities, soldiers, mob violence, war, bombardment, insurgency, revolution, neutrality, and defense, rest upon particular rules of liability which must be determined by a study of each case. This is a rather unsettled part of the law of international claims, and much depends upon the power of the government pressing the claim to demand satisfaction.

XV. Nationality and Citizenship

Meaning of Nationality and Citizenship.—Nationality is a term of general application, and denotes the national character of an individual, from whatever source it may be derived. It does not refer exclusively to political allegiance. Service as a seaman invests an individual with a national character of a certain degree, and with the right to national protection. Citizenship, the chief source of nationality, is a term of municipal rather than of international law. It sig-

nifies the possession within the state of full political and civil rights, within certain limits, such as age and sex. The acquisition of citizenship is regulated by municipal law. Nationality is rather a term of international law. It is often the subject of treaty provisions, and frequently becomes a subject of diplomatic discussion between nations. No fact is more important, from the standpoint of rights, duties, and legal effects, to the state or the individual in their international life, than the doctrine of nationality.

In the United States there is a dual citizenship. Each person is a citizen of a particular state and of the United States. State citizenship does not imply federal citizenship. The qualifications for American citizenship are set forth in the Federal Constitution and laws. All of the states now require American citizenship as a qualification for the exercise of the franchise, but for a number of years some required only residence and a declaration of intention to become a citizen of the United States. The Constitution, while expressly defining who are citizens, leaves the determination of qualifications for voting in federal elections to the states. Conflicts necessarily ensued, and until recent years persons not American citizens could vote in a few states for the President of the United States.

Sources of Nationality and Citizenship.—Three sources of citizenship are generally recognized: birth, naturalization, and revolution. Under the *jure soli* citizenship by birth may be acquired in a particular place. By the early doctrine of the common law citizenship was conferred on all persons born within a particular country. This became a part of our jurisprudence, and the doctrine was applied generally by the Department of State and the courts of law. The Civil Rights Act of 1866 stipulated that "All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States." Under the Fourteenth Amendment to the Constitution, "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." Thus, according to our fundamental law, the status of citizenship is fixed by the place of nativity. Such was the early American doctrine.

Citizenship by birth is also acquired under the *jure sanguinis,* or by right of blood, depending on the nationality of the parents. This source is not included in the Constitution, but is provided for by statute. By an act of 1855, "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States,

whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers have never resided in the United States." The requirement of residence on the part of the father does not apply to members of continuous communities of American citizenship maintained in Turkey for religious or commercial purposes. Descendants who are members of these communities are regarded as American citizens, without regard to the residence of the father. The application of the principle of the *jure sanguinis* has often resulted in conflicts with the claims of other states. Under the law of 1855 there cannot be an indefinite transmission of citizenship by persons who have never resided in the United States.

Another source of citizenship is revolution. Persons born before the Declaration of Independence could elect to retain their British allegiance, or to become citizens of one of the states. American allegiance was assumed, and British allegiance dissolved with the Declaration of Independence, according to the American view. The British regard the change as taking effect from the date of the treaty of peace of 1783.

Naturalization in the United States.—The exclusive power to pass naturalization laws is vested by the Constitution in the Congress, but they are required to be "uniform." Under this authority a number of laws have been passed which provide for the admission of aliens to American citizenship. Naturalization is also regulated somewhat by a series of treaties, the first of which was negotiated in 1868. An entire community may be naturalized by a collective process. Ordinarily, naturalization is an individual act, and is regulated by the laws of the naturalizing country. Proofs of residence, change of allegiance and fitness are usually required. It is a constitutional process, for "All persons . . . naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside." It is also a judicial act, and must be performed by the courts. Today the federal district courts, the federal district territorial courts, state and territorial courts of record, the Supreme Court of the District of Columbia, and the district court of Porto Rico are authorized to naturalize aliens. At first only "free white persons" could be naturalized. The privilege was extended in 1870 to "aliens of African nativity and to persons of African descent." The law now admits "white persons," and persons of African descent. According

to the federal courts, the term "white person" must be given its common or popular meaning, and be held to embrace all European races and the Caucasians belonging to the races around the Mediterranean Sea. By act of Congress of 1882, the courts are forbidden to naturalize Chinese. Naturalization has also been refused to Japanese and Burmese, on the ground that they are not of the white race. Indians are naturalized by special act of Congress or by treaty, but the naturalization statutes do not extend to them. Under the act of June 2, 1924, non-citizen Indians born within American territorial limits were declared to be citizens of the United States.

For the acquisition of citizenship several conditions are set forth in the naturalization statutes. A declaration of intention to become a citizen must precede formal admission by two years. An oath of allegiance must be taken. Residence for five years in the United States is required, and for one year in the state of admission. Moral and orderly behavior is required. Hereditary titles or orders of nobility must be renounced. The law of June 29, 1906, added certain requirements. A declaration of intention ceases to be effective unless acted upon within seven years. The applicant must generally be able to speak the English language. Excluded classes are polygamists or believers in the practice of polygamy, persons opposed to or not believing in organized government, or belonging to or affiliated with organizations holding or teaching such belief or opposition, and persons who advocate the unlawful assaulting or killing of American or other officers of governments because of their official character. Certificates improperly obtained may be cancelled. A naturalized person who returns to his native or other country within five years after his admission to citizenship to establish a permanent residence there may have his certificate cancelled as fraudulent, unless there is evidence to the contrary.

Dual Allegiance.—Where two different laws of citizenship conflict, the fact of a double allegiance arises. This is not a mere theory, but is an actual situation. A person may be a citizen of one state by right of birth within its borders, and a citizen of another by reason of the nationality of his parents. In this case he is a citizen of the state of his birth by the *jure soli,* and of his parents' country, *jure sanguinis.* A conflict arises when the claims of both states are urged. The child in this case usually performs the duties of allegiance in the country of his actual residence. If the father of a child moves to a new country and acquires the allegiance of the country of his new resi-

dence, there is a definite conflict. The child has the allegiance of the father through his naturalization, and also the allegiance of his place of birth. The child, upon reaching his majority, may elect his nationality. A person also has a dual allegiance where he is a citizen of one country by birth, and of another by process of naturalization. Under the principle of expatriation this condition does not take place.

The Principle of Expatriation.—The theory of expatriation was not at first accepted by the United States as regards its own citizens acquiring a new allegiance. We held rather to the common law theory that birth in America conferred an indelible allegiance which could not be dissolved at will. On the other hand, we freely admitted to American citizenship the citizens of other nations without considering or recognizing the claims of prior allegiance. Such a policy led to inevitable conflict as to claims. In time the United States was called upon to protect its newly naturalized citizens against the claims of states which refused to admit the dissolution of the former tie of allegiance. The return of such citizens to their old countries caused trouble. These states called upon the adopted Americans to perform their duties of prior allegiance. They would not recognize our claim, since we did not admit similar foreign claims. By the law of July 27, 1868, expatriation was held to be an inherent right of all people. Naturalized citizens were to have, while abroad, the same rights and protection which belonged to native citizens, and the President was authorized to take measures short of war to secure such rights for American citizens. There was to be no difference in the rights enjoyed by the native and naturalized citizen, except the one imposed by the Constitution itself. This municipal law could not have the effect of changing the attitude of the states of prior allegiance. To secure a recognition of the right of expatriation by the countries of Europe would require a reciprocal recognition by the United States of the rights of its own citizens to divest themselves of American nationality at will. Several treaties were negotiated, under which a citizen of one country, naturalized and residing for five years in the other, lost his prior allegiance. These treaties had the effect of reconciling many conflicts of allegiance, and of releasing a very serious problem from the field of international controversy. By an act of March 2, 1907, naturalization or an oath of allegiance by an American in a foreign country is deemed to be an act of expatriation. A naturalized person who resides two years in the state of origin or five years in any other state, in the absence of countervailing evidence, ceases

to be an American citizen. No American citizen may expatriate himself in time of war.

Citizenship of Women.—Birth in the United States or abroad has been held to confer American citizenship without regard to sex. Alien women may be naturalized in the United States under the same conditions as alien men. An act of 1855 provided that an alien woman who might be naturalized became an American citizen through her marriage to an American citizen. In 1907 a law was passed providing that an American woman, marrying an alien, assumed the citizenship of her husband. The law of September 22, 1922, changed the rules as regards the citizenship of women. An alien woman may under this law become a citizen by naturalization even if her husband remains an alien. Marriage of an alien woman to an American citizen does not confer American citizenship upon the woman; she must resort to process of naturalization if she is to become one. If an American woman marries an alien, she is deemed to retain her American citizenship, unless she chooses to renounce it. If an American woman marries an alien ineligible to naturalization, she loses her American citizenship. If a woman has lost her citizenship through marriage to an alien, she may regain it by naturalization.

The National Protection of Citizens.—One of the privileges of allegiance is the national protection of the country of one's citizenship. It is a general right, and extends to all citizens in all cases where their rights have been invaded or their persons or property outraged, or where justice has been denied them. The conditions of protection are set forth elsewhere. Conditions may result in the loss of the right of national protection. A native citizen, resident in a foreign state, is entitled to the protection of the United States, unless by his own act he has made himself a subject of the foreign power. A neutral engaged in business in an enemy country is regarded as a citizen or subject of the enemy state, and not entitled to the protection of the neutral state. As already stated, a naturalized citizen loses his citizenship, and therefore his national protection, by residence for two years in his country of origin, and five years in any other country. American business houses enjoy a protection against which the usual rules do not apply. Persons residing in American communities in Oriental lands do not lose the right to protection by reason of long residence abroad. Naturalized citizens who assume offices in the government of the country of origin will not generally receive the diplomatic protection of the United States. Taking part in politics in a foreign country

removes the right to national protection. Unneutral conduct committed by American citizens outside the jurisdiction of the United States must be punished abroad, but such citizens forfeit all protection from the American Government. The protection of the United States is not extended to criminals and fugitives from justice, even though they may have been born or naturalized in the United States; it can be claimed only by citizens having an honest purpose.

XVI. Peaceful Measures for the Settlement of International Disputes

Diplomatic Negotiation.—We have already fully discussed the diplomatic function and the rights and duties of American diplomatic officials. Diplomatic negotiation is the usual method of settling differences and of securing international redress. In fact, most of the questions which would ripen into problems of international conflict are discovered and dealt with through diplomatic officials. Friendly diplomatic intercourse conduces to the peaceful and orderly adjustment of differences. The parties to a difference, through the discussions of their diplomatic representatives, easily arrive at a frank understanding of the nature of their problem and at a satisfactory settlement. Sometimes it is necessary to have recourse to special representatives. Occasionally international conferences of considerable magnitude are held for the purpose of settling differences. It is only when a difference is not settled by ordinary negotiation that process of arbitration is resorted to.

Mediation.—A common method of settling a dispute is by recourse to the good offices or mediation of a friendly power. This method is used in the first place to adjust ordinary differences which do not amount to or threaten war. In 1887 the government of Salvador requested the American minister to mediate in a difference between itself and Italy for the settlement of a claim against Salvador growing out of the sale of a government printing establishment in that country to a subject of Italy. The amount of the claim was 2,000,000 francs. The American Government replied that it could not mediate without further information. It was suggested that the government of Salvador should agree upon a reasonable sum for settlement; if this was rejected by the Italian government, the good offices of the United States would be then offered. The assistance of Mr. Hall, the American minister, was later sought by the diplomatic representative of Italy, who was advised that if both parties joined in requesting the mediation of Mr. Hall, he might visit Salvador for that pur-

pose. Accordingly Mr. Hall tendered his good offices with the result that the claim was amicably adjusted for a figure of $270,000 payable in instalments. Mediation is also used in order to avert hostilities. President Polk declared in his annual message of December 4, 1849, that the United States stood in readiness to extend its mediation and assistance to the South American nations in case of collisions with states of Europe. On a number of occasions the United States has acted in the rôle of mediator in the interests of preventing war in the Latin-American states. Mediation is often used as a process of ending war. In the conflict between Spain and the republics of the west coast of South America in 1865 and 1866, the United States tendered its good offices to each for the purpose of ending the war. In 1866 Mr. Seward proposed that a conference should be held in Washington for the purpose of bringing the war to an end. Bolivia and Ecuador yielded to the decision of Chile and Peru. Chile and Peru agreed to hold the conference under certain conditions, one of which was that Spain should admit that her bombardment of Valparaiso was a violation of international law. Spain had accepted the proposal under certain conditions, but refused when the Chile-Peruvian conditions were communicated to her. Mr. Seward renewed his proposals in 1868. Spain accepted, while Peru and Ecuador were disposed to accept. Chile and Bolivia were opposed to the conclusion of a final treaty of peace, but were ready to enter into a truce. In 1869 Hamilton Fish, Seward's successor as Secretary of State, again suggested a conference. The conference met in 1870 in Washington. The question of the bombardment of Valparaiso prevented the conclusion of a formal treaty of peace, but a general armistice or truce was entered into. The conference reassembled in 1872 but again adjourned on account of the troublesome Valparaiso question.

President Roosevelt was an active mediator in ending wars. His boldest mediation was in the Russo-Japanese conflict, when his intervention led to the conference of Portsmouth and extended also to the negotiation and the formulation of the basic terms of peace. His appeal to the sovereigns of the states over the heads of the commissioners authorized to sign a peace was an unprecedented act. The situation was complicated, owing to the fact that European as well Far-Eastern foreign policies were involved. Due to his determined mediation, almost to the point of intervention and even of dictation, the Japanese demands were modified and the Treaty of Portsmouth was eventually agreed to. He also intervened, together with President Diaz of Mexico, in the Central American conflicts of 1906 and 1907.

His mediation in 1906 terminated a war between three of the Central American states, but in 1907 the war broke out again. He joined President Diaz in urgent representations to the Central American states in the interests of peace. Finally a conference on Central American affairs was called at Washington in 1907. Opened under the guidance of Secretary of State Elihu Root, this conference entered into a general treaty of peace which formally ended the war, established a general treaty of arbitration between the signatory powers, and set up the Central American Court of Justice. These states were induced to enter into an armistice prior to the Washington Conference. The representatives of the belligerent states were placed on board the U.S.S. *Marblehead;* the ship steamed away from shore, and while on board the representatives came to an understanding.

The Convention for the Pacific Settlement of International Disputes agreed upon by The Hague Conferences of 1899 and 1907 makes explicit provision for the office of mediator. This function was suggested by Mr. Holls, the Secretary of the American delegation. The mediator may offer his services in case of a dispute between friendly powers, or the parties to the controversy may request them. It is his business to examine the matters in dispute and to recommend some peaceful settlement. It is purely a recommendatory function, for the suggestions of the mediator are not binding on the parties, which may accept them, modify them, or reject them altogether. An offer to mediate cannot, in the language of the convention, "be regarded by either of the parties at variance as an unfriendly act." It was suggested at the conference that in suitable cases the parties to the dispute should agree upon a friendly third power with a view to recommending measures for composing their differences. The United States is a party to this convention. While the method under the auspices of The Hague Convention has not been tried, it offers ample possibilities for the adjustment of disputes which do not lend themselves to judicial settlement.

Arbitration.—The usual method for the settlement of justiciable questions is arbitration. This is a judicial function and legal methods are strictly applied in the act of settlement. Questions which are political in their nature are not as a rule referred to commissions of arbitration. While mediation is an advisory function of recommendation, decisions are actually reached by arbitration. Many questions which nations would not refer to mediation have been settled by arbitration. The significance of arbitration as a legal means for the settlement of disputes is amply set forth by Professor Moore in the following terms:

Arbitration on the contrary, represents a principle as yet only occasionally acted upon, namely, the application of law and of judicial methods to the determination of disputes between nations. Its object is to replace war between nations as a means of obtaining national redress, by the judgments of international judicial tribunals; just as private war between individuals, as a means of obtaining personal redress, has in consequence of the development of law and order in civilized states, been supplanted by the processes of municipal courts. In discussing the subject of arbitration we are therefore to exclude from consideration, except as a means to that end, mediation, good offices, or other forms of negotiation.

When nations agree to submit a controversy to arbitration, they sign a treaty stating the question at issue, defining the arbitrators' powers, providing for the appointment of the arbitrators, and regulating arbitral procedure. The work of the arbitrator is not such that his appointment requires confirmation by the Senate. It is not a position of office holding. The work is occasional and is also contingent upon the appointment of the arbitrator by foreign powers to act in the settlement of disputes between them. Sometimes the powers of the arbitrator are full and complete under the treaty of arbitration, and at other times they are expressly limited. It was the view of Lord Chancellor Loughborough that the commissioners under Article 7 of the Jay Treaty had the power to settle their own jurisdiction, and that it was necessary for them to decide whether cases fell within or without their competency. The arbitrators usually make their decisions by a majority vote. This is especially true in countries whose jurisprudence is founded upon the principles of the Roman Law. The usual practice of international law is the concurrence of a majority of the vote of arbitrators in reaching a decision, and this practice prevails generally in arbitrations to which the United States is a party. The decisions of international commissions may establish principles of international law, but they are not to be regarded *per se* as being declaratory of international law. Attorneys and agents are usually employed to represent the claims of the parties. The expenses of the arbitration are usually borne equally by the parties to the controversy. The expense of agents and counsel and individual expenses, such as the preparation and binding of the documents of the case, are borne by each state. A common practice is to make some gift to the arbitrator in the form of a plate or other token, or in money. If the arbitration has been performed by the head of a state, an expression of thanks is extended to him, while the substantial gift is bestowed upon the persons charged by the arbitrator with conducting

the arbitration. Where claims are honored in behalf of citizens of the United States, the money is usually paid over to the Secretary of State and is disbursed to the claimants by the disbursing clerk of the Department of State. Tribunals of arbitration are generally forbidden by treaties and conventions to consider claims which have not formally been presented to them. By the principle of *res judicata* the decision of a tribunal of arbitration is final and cannot be revised except through the consent of the contesting sovereign. The award of the tribunal is, therefore, usually final. However, an award which is made outside the limits of the treaty of submission is not binding on the parties. A decision of an arbitral tribunal may be impeached for fraud either on the part of the tribunal itself or on behalf of the parties to the arbitration.

The United States has been a party to many treaties of arbitration, both general and special, for the settlement of international disputes. Most of these treaties have been between the United States and Great Britain, and the United States and Latin-American countries. This government has encouraged arbitration as a principle in the Pan-American Conferences to which we have been a party. The United States is a signatory power to The Hague Conventions of 1899 and 1907, which have set up a permanent court of arbitration at The Hague, and have established an arbitral machinery which is open to all nations of the world on a voluntary basis. Moreover, we have been a party to a number of distinguished arbitrations under these conventions. The latest step of the United States in the direction of the peaceful settlement of disputes is its attempted adhesion to the protocol of signature of the Permanent Court of International Justice. This court provides a tribunal which is definite and permanent in personnel and practically continuous in session, to which the nations may, under either ordinary or extraordinary procedure, resort for the peaceful settlement of almost any kind of international dispute. It is to this court that many friends of international peace look to preserve the peace of the world.

The Conference on Signatories to the World Court Protocol met at Geneva in September, 1926, to consider the American reservations. The Senate of the United States resolved to adhere to the Protocol of Signature of the World Court, provided that such adherence involve no legal relations with the League of Nations; that the United States might have a share on a basis of equality in the election of judges; that the American Congress should determine the expenses to be defrayed by the United States; that the statute for the Court

should not be amended without American consent; that advisory opinions should not be rendered except publicly after notice to all adhering and interested states; and that no advisory opinion, touching any dispute in which the United States has or claims an interest, could be requested without the consent of the United States. The conference met in the International Labor Office. After some discussion, all reservations were accepted in principle. The trouble arose over the last part of the fifth reservation, which would give the United States the right to prevent any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest. The delegates of the various states were unanimous in their desire to bring the United States into the League and to do everything possible to meet American requests in the matter. On the other hand, they had due regard for their own constitutional law. They regarded it as axiomatic that the United States should be brought in if possible; that its entry should be on a basis of equality and not of special privilege; that the conditions of entry should not be such as to impair the effectiveness of the League of Nations or the Permanent Court of International Justice. Unfortunately the American government did not see fit to designate a representative to discuss and explain our reservations. The conference took the view that a mere exchange of notes was hardly the proper way to discuss and consent to reservations having the effect of virtually amending the protocol. It was quite clear that the delegates were opposed to an arrangement which would give the United States the blanket power to hold up an advisory opinion in which it might have no real interest, but which was vital to other interested nations and possibly to the peace of the world. There was also some question as to what agent of government in the United States would determine America's actual or fancied interest. Would it be the President, the Senate, or would the United States agree to vest the determination of this question in the Court itself? The conference finally agreed to the acceptance of this reservation with an interpretation that would definitely fix our status as that of an equal but not as one having a superior or privileged right. President Coolidge, in his Armistice Day address, pointed out that he did not intend to request the Senate to modify the position which it had already taken.

XVII. Non-Amicable Modes of Redress Short of War

One of the most common non-amicable modes of redress is the severance of diplomatic relations. This may be in the form of a gesture or a

threat, or it may be in the form of an ultimatum. The usual significance is that, in the opinion of the withdrawing state, further diplomatic negotiation is useless, and it often indicates the intention of either or both of the states to advert to more unfriendly methods. The United States has on a number of occasions used this method of protest. In the case of Germany and Austria the severance of diplomatic relations on the part of the United States soon led to a declaration of war.

Another mode of redress is retorsion or retaliation. Retorsion is retaliation in kind against certain injurious acts committed by another state. It is the right of a state to abate a nuisance which is annoying, inconvenient, or threatening. Sometimes an injustice can be remedied only by the removal of the cause of offense. Between nations, acts of retorsion or retaliation, even though forcible, do not generally amount to acts of war. It is usually within the right of the state to commit such acts of retorsion, which are evidence of unfriendliness and represent an effort on the part of the offended state to redress its injuries in kind and in degree in proportion to the damage suffered. For example, if the ports of a state are closed to the ships of another state, the offended state by closing its ports in turn is retaliating through retorsion. A display of force is often a harmless but effective method of bringing a recalcitrant state to terms. It is the practice of the United States to maintain naval forces in the region of the Caribbean Sea, and in the waters of the small Latin-American countries. The appearance of our naval forces has had a salutary effect, and has been an effective tonic in the direction of preventing, adjusting, and terminating revolutionary troubles.

The use of force is a common method of redress. It is sometimes used by special authority. In 1832 Captain Duncan was sent with the warship *Lexington* to the Falkland Islands, where he forcibly suppressed the operations of one Vernet, an Argentine renegade who had formed an establishment on one of the islands and had captured three American ships. Two of these ships were appropriated by Vernet without trial and were fitted out to make further aggressions on the property of American citizens. The United States urged the government of Argentina to suppress the activities of Vernet, but without result. The Argentine representative vigorously protested the conduct of Captain Duncan and charged that the United States acted in derogation of Argentine sovereignty. The Department of State replied that it was an act of necessary self-defense and that the United States had

the right to abate a nuisance involving lawless aggressions upon the persons and property of its citizens.

Force is sometimes used without authorization on the part of the government. A naval or army officer must at times use his discretion as to the measures which he must take in order to secure satisfaction for the United States. The United States must, however, assume responsibility for the unauthorized as well as the authorized acts of its officials.

The use of force resulted in getting preferential payments for the governments which blockaded Venezuelan ports in 1903. The blockade was instituted by Germany, Great Britain, and Italy, and was terminated through the reference of the question to The Hague Tribunal. The arbitrators decided that the claims of the blockading governments should take precedence of the claims of the non-blockading governments. This decision unfortunately placed a premium upon the use of force, and put the governments which attempted to collect their debts forcibly in the preferred position.

Still another mode of redress short of war is the use of reprisals. As distinguished from retorsion, this is the seizure or arrest of goods or trade of subjects of a state as an offset for injuries sustained. It does not attempt to respond necessarily in manner, kind, or degree, but it does attempt to assess the damage sustained and to recover for the amount of the injury in some substantial form. Reprisals are used to gain the ends of justice when they cannot be gained in another way. Where a nation refuses to adjust a debt, to redress an injury, or to make a proper settlement, the property of the offending state may be seized by the injured state and applied to its advantage until a substantial act of justice has redressed the wrong. The making of reprisals against a nation is serious business and should be undertaken only with a clear understanding of the possible consequences. The offended nation should first remonstrate, and if satisfaction is refused, reprisals may follow.

Another mode of redress is the "pacific blockade." The term is a misnomer in international law because the term "blockade" applies to a well-known belligerent right, and the word "pacific" indicates a peaceful measure. Some writers on international law deny the existence of such a measure. The purpose of the pacific blockade is to induce governments refusing or delaying the adjustment of their claims to treat with respect to the matter of settlement. In 1901 the German ambassador at Washington indicated the purpose of his

government to institute a pacific blockade against Venezeula in order to bring about a settlement of claims. It was declared that "this blockade would touch likewise the ships of neutral powers, inasmuch as such ships, although a confiscation would not have to be considered, would have to be turned away and prohibited until the blockade should be raised." It later appeared that Great Britain and Germany would act together. The United States declared that it did not acquiesce in any extension of the doctrine of pacific blockade which would affect adversely the rights of states not parties to the controversy, or discriminate against the claims of neutral nations. The United States reserved all of its rights in the premises. Germany replied that, yielding to the suggestions of Great Britain, it would institute a war-like instead of a pacific blockade, but that there was no intention to declare war or to proceed beyond the establishment of a war-like blockade. Secretary of State Hay asked what was intended in a war-like blockade without war, especially as regards neutrals. The German Government replied that while no formal declaration would be made, a state of war would actually exist. A blockade of certain ports was duly proclaimed. Mr. Balfour, the Prime Minister of England, declared that he agreed with the American Government in the proposition that there was no such thing as a pacific blockade, and that a blockade involved a state of war. Accordingly, notice of blockade was given in due time for the protection of neutral interests. The United States did not deny the existence of a pacific blockade, but refused to recognize its extension insofar as it would affect the rights of states not parties to the controversy.

A commercial measure for the redressing of injuries is the embargo. The embargo may be general or limited in its scope and application. It may apply to certain ports, coasts, articles, imports and exports, regions, or countries. In 1794 Congress laid an embargo for thirty days on all ships and vessels in American ports bound for any port or place. A number of other embargoes were instituted by the government during the controversy between the United States and the belligerent governments relating to neutral rights and duties.

Another non-amicable commercial measure for adjusting disputes is non-intercourse. In 1798 an act of Congress suspended commercial intercourse between the United States and France. This act was the beginning of what is generally called a limited naval war conducted by the United States and France on the high seas. The war was undeclared, but hostile acts were committed. Washington was made Commander-in-chief of the Army, and Hamilton was made his im-

mediate aide. The country actually prepared for war. In 1809 it was made unlawful to import into the United States any goods which were the products of France. The penalty under this act was forfeiture of the goods.

The commercial measures of redress commonly known as embargo and non-intercourse have been adopted in modified form by the League of Nations, and they form a leading part of the sanctions which will in the future enforce compliance with the mandates of the League. Their application in the United States is limited usually to conflicts which seriously disturb our neutral maritime rights.

XVIII. The Beginning and End of War

The Beginning of War.—A formal right to declare war is vested by the Constitution in Congress. The legislative body, however, is not in a position to judge of the events which might justly occasion war. It is within the discretion of the executive, therefore, to determine if and when war is desirable and to make his recommendations to Congress accordingly. The effect of this practical situation is to vest the initiative in war-making in the President, while the legal power to declare remains with Congress. The first step in war-making, therefore, is the recommendation of the President to Congress. A classic example of the action of the President in this regard is the war with Mexico. The region lying between the Nueces River on the north and the Rio Grande River on the south was disputed territory claimed by Mexico and the United States alike. Mexico was in partial possession and the Mexican soldiers were instructed to fire upon contesting armies. Mr. Polk, fully conscious of the results of his order, gave instructions to American troops to occupy the disputed area. The Mexican Government took the view that Mexican soil had been invaded and that resistance was the only honorable course open to the Mexican forces. Mr. Polk went to Congress with the statement that American blood had been spilled on American soil, whereupon Congress declared war against Mexico in accordance with the President's recommendations. There was much opposition to this course in Congress and even more so in the country at large. Moreover, there has been considerable question as to the justice of our cause in the Mexican War. The chief argument against our own case seems to rest on the ground that the President acted precipitately in resisting the presence of Mexican forces within the American-claimed territory, and on the ground that we acquired so much territory from Mexico. Mr. Webster re-

garded the Mexican War as practically an undeclared one and stated that Mr. Polk made it. While the course of the President may be open to censure from certain standpoints, there seems to be little else that he could have done under the circumstances. Battles had been fought on soil claimed by the United States. The disputed territory was American domain in the sense that it had been claimed by Texas and incorporated into the Union in 1845, and that the revenue laws of the United States had been extended to it. The President pressed certain claims against Mexico which had repeatedly been neglected. The settlement of these claims would sooner or later have become an issue which probably would have led to war, had Mexico left them unadjusted, and had she given evidence of continuing in this frame of mind. The territory secured from Mexico was in Polk's mind something of a compensation for Mexico's attitude in regard to these claims. The House of Representatives was not friendly to the President's proposal, and on January 3, 1848, it passed a joint resolution declaring that the Mexican War had been unnecessary and unconstitutionally begun by the President. A little more than a month later a proposal to rescind this resolution was defeated by a vote of 105 to 94.

The declaration of war against Spain in 1898 was an interesting development. Since 1868 the United States had protested repeatedly against the condition of things in Cuba. The Spanish Government had not succeeded in terminating the insurgent activities of an increasing number of Cubans who were dissatisfied with the Spanish régime. The Spanish Government, in its resistance to insurgent activities, used harsh and oppressive measures. The cruel policy of "concentration," initiated in 1896, was really a measure of extermination. A number of American citizens had been imprisoned. President McKinley, in his annual message of December 6, 1897, urged that the pacification of the island must be completed. Spain answered that the pacification of the island must begin with the submission of the rebels to the mother-country. The President pointed out the possible courses open to the American Government and expressed the hope that the situation might be relieved without the intervention of the United States. He said, however, that it might be our duty to intervene by force and, if so, it should be "without fault on our part, and only because the necessity of such action would be so clear as to command the support and approval of the civilized world." In the meantime the U. S. S. *Maine* was sunk on February 12, 1898, as a result of an explosion. Two hundred and sixty-five of its officers and crew lost their lives. The American and Spanish naval commissions rendered opposite

reports as to the cause of the explosion. Senator Proctor of Vermont had visited the island and had declared in a notable speech in the Senate that Spain was unable to restore order. General Woodford, the American ambassador at Madrid, continued to work earnestly for a practicable basis of settlement. The Spanish Government offered as a last resort to submit the *Maine* affair to arbitration, to revoke all orders of concentration, and to accept the aid of the United States in forwarding and extending succor to all persons in need, and to confide the preparations for the pacification of the island to an insular parliament. The Spanish Parliament, however, did not meet until May 4, and Congress was too impatient to wait longer. Some writers have asserted that the impatience of the Congress caused the war. Thirty years of reliance on Spanish maladministration and promises of reform might have reasonably convinced a legislative body that further reliance was folly. On April 11, 1898, President McKinley discussed the Cuban situation in his message to Congress, and commended a certain promise on the part of Spain to relieve the situation. On April 19, 1898, Congress passed the following joint resolution for intervention, which was in effect the declaration of war against Spain:

Whereas the abhorrent conditions which have existed for more than three years in the Island of Cuba, so near our own borders, have shocked the moral sense of the people of the United States, have been a disgrace to Christian civilization, culminating, as they have, in the destruction of a United States battleship, with two hundred and sixty-five of its officers and crew, while on a friendly visit in the harbor of Havana, and cannot longer be endured, as has been set forth by the President of the United States in his message to Congress of April eleventh, eighteen hundred and ninety-eight, upon which the action of Congress was invited: Therefore,

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, First. That the people of the Island of Cuba are, and of right ought to be, free and independent.

Second. That it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the Government of Spain at once relinquish its authority and government in the Island of Cuba, and withdraw its land and naval forces from Cuba and Cuban waters.

Third. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several states, to such extent as may be necessary to carry these resolutions into effect.

Fourth. That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said Island,

except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the Island to its people.

The United States entered the World War after a series of violations of its neutral rights. Early in the War the President had issued a proclamation of neutrality and had urged the people to be neutral in thought as well as in action. This neutral position the President tried desperately to maintain as respects right and duty in the midst of opposition both at home and abroad. Both the Allied Powers and the Central Empires desired a relaxation of neutrality rights insofar as they were concerned, but demanded that the United States should compel the other enemy states to respect its neutrality. Two lines of thought soon developed. The Allied cause received an increasing amount of support and the drift of public opinion was steadily toward this group of belligerents. The friends of the Allies openly urged America's entry into the war against the Central Powers, especially Germany. The friends of the Central Empires at no time urged American participation in the war on either side. They became the fast friends of neutrality and urged consistently the continued neutral position of the United States, at the same time decrying the efforts of the President to compel Germany to respect our neutral rights. When notice was given by Germany that she would resume her campaign of unrestricted submarine warfare, the hopes of the President to keep aloof honorably from the entanglement of war, and to act in the rôle of peace-maker, rapidly dwindled. On April 2, 1917, he appeared before Congress and delivered his famous war message. The die was cast; the days of neutrality were behind and the days of war were ahead. He set forth, in a message celebrated for its logic and rhetoric, repeated grievances of the United States against Germany. After listing these counts, he stated the grounds on which the war should be fought and on which the peace should be made. The right, he said, was more precious than peace, and the world should be made safe for democracy. We would fight for the rights of nations, great and small, and the privileges of men everywhere to choose their way of life and of obedience. Four days later Congress passed a joint resolution declaring war against the Imperial German Government. The resolution simply declared that the Imperial German Government had committed repeated acts of war against the government and the people of the United States, and for this reason war was formally declared.

In the declaration of war three steps are necessary: in the first

place, the President must call the attention of Congress to a situation which, in his opinion, justifies the declaration; in the second place, Congress must, in the exercise of its constitutional authority, declare a state of war to exist; and in the third place, the President must give his approval to the resolution.

The Termination of War.—Actual hostilities usually cease by virtue of agreements between the military chieftains of the contending forces. If the war ends in a compromise, and if defeat is not apparent on either side, the belligerent states may simply agree to suspend hostilities. If the result of the conflict is decisive, the conditions of a cessation of hostilities are usually communicated to the defeated forces by the commander of the victorious ones. Often the defeated commander must surrender, and in the act of surrender he usually agrees to the terms exacted by the conqueror. The President, acting under his authority as Commander-in-chief of the Army and Navy, may suspend hostilities on his own initiative. Sometimes the end of war takes the form of a formal capitulation or surrender. Such was the case when General Lee surrendered the Confederate Army to General Grant. Again, it may take the form of an armistice setting forth the various conditions which shall prevail pending the final settlement. This was true in the World War when the armistice was signed on November 11, 1918. Further, it may take the form of a protocol, which, in addition to defining the relations between the parties pending the final negotiations, may, and often does, set forth the subjects to be settled at the peace conference. It may also indicate the line of settlement. This was true of the protocol which brought the war between the United States and Spain to an end in 1898. The usual method of terminating a war is by a formal treaty of peace. The Constitution does not expressly confer upon any agency of the government the right to make peace. The decisions of the Supreme Court hold that the President and Senate may, through the treaty-making power, acquire territory either by conquest or by cession. There is a rule of international law that title to territory gained through conquest is inchoate until formally ratified by a treaty of peace. The best opinion on the question is that the treaty of peace is the only legal and constitutional manner of ending a war. The practice of the United States confirms this theory, but there has been no definite statement that the contrary would be impossible or unconstitutional. There is no doubt that a conquering state may, if it has the power and design, end a war by reason of its superior military forces. The failure of the conquered state through its constitutional channels to ratify the

provisions of an enforced peace would have little effect on the result. If the life of the defeated state is extinguished by reason of the war, or if it is reduced to a colony or dependency, a treaty is unnecessary, undesirable, and impossible. However, the legal consequences which follow a war must be regulated in some way and the ordinary mode is by means of a treaty of peace. The treatment of nationals of former belligerent states requires attention. The resumption of peaceful relations and the definition of future relations is necessary. Ordinary commercial intercourse must again in the usual course of events be resumed.

It is sometimes held that a war may be legally terminated by a peace resolution passed by Congress and approved by the President. President Wilson was the chief negotiator for the United States of the celebrated treaty of peace with Germany. The President and the Senate were deadlocked over the matter of ratification. Certain leaders of the Senate, notably Senator Knox of Pennsylvania, urged that the war be terminated legally by a Congressional peace resolution. In May, 1920, both houses of Congress jointly resolved "that the joint resolution of Congress passed April 6, 1917, declaring a state of war to exist between the Imperial German Government and the Government and People of the United States, and making provisions to prosecute the same be, and the same is hereby, repealed, and said state of war is hereby declared at an end." President Wilson, whose approval was necessary, immediately vetoed the measure. It was passed again in July, 1921, under the Republican régime, and declared in effect that the state of war between the United States and Germany was at an end. President Harding gave his approval. A separate treaty was negotiated with Germany under which all rights flowing to the United States, under the Treaty of Versailles, as an allied and associated power, were reserved to the United States. The legality of this procedure has been both championed and denied. The argument in favor of the measure is that Congress, having declared war by resolution with the approval of the President, can end it in the same manner. The weakness of this argument seems to lie in the fact that, while the right to declare war is expressly conferred upon Congress and is a strictly unilateral act, the making of peace is not so conferred and is an international bilateral act. Even in the case of the vanquished state, it is certain that the agreement of the defeated government is not only necessary but desirable in regard to certain provisions of the treaty. A resolution of Congress is purely an act

of municipal law, whereas a treaty is an international agreement and an international undertaking.

It is sometimes urged that the President may legally terminate a war by a proclamation. It is true that he may agree to a termination of hostilities. Such an act, however, grows out of his authority as Commander-in-chief of the Army and Navy, and is purely a power of municipal law. The formal ending of war, therefore, is an international transaction requiring the assent of the parties, and can be celebrated only through a formal treaty of peace.

READING NOTES

General

There are several good references on the administration of American foreign affairs. A comprehensive one is Mathews' *Conduct of American Foreign Relations.* This is a clear and fairly concise treatment of the subject from many angles. *Our Foreign Affairs,* by Paul Scott Mowrer, is devoted to a discussion of our new place in the world, democracy and foreign policy, the new diplomacy, and the diplomacy of the United States. Special attention is given to control through democratic methods. A standard work is Foster's *Practice of Diplomacy.*

The best source in print is the chapter on the "Intercourse of States," in Moore's *Digest of International Law,* vol. IV.

Control of Foreign Relations

The admirable volume of Quincy Wright on *The Control of American Foreign Relations* is the most satisfactory secondary account. It is perhaps too technical for the general reader. The authority of the executive in foreign affairs is described by Corwin in *The President's Control of Foreign Relations.* Control under President Wilson is described in Scott's *President Wilson's Foreign Policy.* The student will find much of interest in Seymour's *Intimate Papers of Colonel House.*

The Diplomatic Service

The reorganized foreign service under the Rogers Bill, with special emphasis on the diplomatic function, is discussed in Lay's *Foreign Service of the United States.* Mr. Lay is a consul-general of the United States. It has a foreword by Charles E. Hughes. *The Report on the Foreign Service,* issued by the National Civil Service Reform League, is an analysis of the defects of our diplomatic organization, together with recommendations for improvement. *Instructions to Diplomatic Officers of the United States,* issued by the Department of State in 1897, is a standard source of information for the

foreign service. The student should refer also to Hershey's *Diplomatic Agents and Immunities.*

The Consular Service

The *American Consular Service,* published in Washington in 1920, is the official book on the subject. An excellent book is Jones' *Consular Service of the United States.* The legal phase of the office is presented in Stowell's *Consular Cases and Opinions.* See also Stowell's *Le Consul: Functions, Immunités, Organisations, Exequatur.* Extra-territorial practice of the United States is disclosed in Hinckley's *American Consular Jurisdiction in the Orient.*

Treaties

The two standard works on treaties are Crandall, *Treaties, their Making and Enforcement;* and Butler, *The Treaty-Making Power of the United States.* See also Moore's *Digest of International Law,* vol. V, pp. 155–387. Fifteen major treaties of the United States are described in Hill's *Leading American Treaties.* See also Devlin, *Treaty Power.*

The Recognition Power

Goebel's *Recognition Policy of the United States,* while concerned chiefly with matters of policy, gives some attention to the power and mode of recognition. See also Moore's *Digest,* vol. I, sections on recognition. Chapters on recognition are given in most of the textbooks on international law.

Extradition

The leading work on extradition is by John Bassett Moore, *Extradition and Interstate Rendition.* This treats of the reciprocal surrender of fugitives from justice by sovereign states, and by the states of the American union. See also Moore's *Digest of International Law,* and any good text on international law.

Aliens

The legal, social, and political aspects of immigration are discussed in Jenks and Lauck's *The Immigration Problem.* The appendix to this book contains the main immigration and exclusion statutes. For the California and Pacific Coast problem, see *California and the Oriental,* issued by the California State printer. The report of the Immigration Commission is the most prolific source of information. As to the status of aliens generally, see Moore's *Digest of International Law.*

Diplomatic Protection

The leading authority is Borchard's *Diplomatic Protection of Citizens Abroad.* See also the chapters on "Claims" and "Intervention" in Moore's *Digest of International Law.*

Nationality and Citizenship

Cockburn's *Nationality* is a standard work on this subject. Van Dyne's *Citizenship in the United States* is a comprehensive book on American citizenship. The same author has a book on *The Law of Naturalization of the United States.* See also Moore's *Digest of International Law,* vol. III, pp. 270–810, and his *Digest of International Arbitrations,* vol. III, 2449, et. seq.

Peaceful Settlement of International Disputes

For the practice of arbitration, see Ralston, *International Arbitral Procedure.* See also the Convention for the Peaceful Settlement of International Disputes, 1907, and the Statute and rules of procedure of the Permanent Court of International Justice.

For non-amicable measures short of war, see Hodges, *The Doctrine of Intervention;* Martin, *The Policy of the United States as Regards Intervention;* Borchard, *The Diplomatic Protection of Citizens Abroad;* and Moore, *Digest of International Law,* vol. VII, pp. 103–151.

Beginning and End of War

This subject is discussed in every good book on international law. See especially Moore's *Digest,* vol. VII. See also Whiting's *War Powers under the Constitution.* A standard work is the *Termination of War and Treaties of Peace,* by Coleman Pillippson.

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